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INSTITUTES  
OF  
AMERICAN LAW.

BY JOHN BOUVIER.

In societate civili, aut lex aut vis valet.—BACON.

Ce qui est bien classé, est à moitié su.—DUVAL

VOL. II.

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# INSTITUTES

OF

# AMERICAN LAW.

## BOOK II.—OF THINGS.

### CHAPTER X.—OF AGENCY.

1269. One of the most important branches to be considered in the law of contracts, is that which relates to the subject of agency. Many of the transactions of life, particularly those which relate to commercial business, are performed by agents. Not a merchant but must deal, frequently, with agents of every description, factors, carriers, auctioneers, brokers, masters of ships, and numerous others. These agencies may be at home or abroad, and they may be for the most trifling, as they are often for the most important affairs. They are either temporary or permanent, and the rights and obligations of the principals and the agents are numerous and varied. It will not be possible to do more than examine the first elements of the subject in the compass allowed to it in this work.

1270. An *agency* is an agreement, express or implied, by which one of the parties called the *principal*, confides to the other, denominated the *agent*, the management of some business to be transacted in his name, or on his account, and by which the agent assumes to do the business and to render an account of it.

1271. The contract of agency is not very unlike

the mandate of the civil law, which has been adopted in our own. The principal difference is this, that the agency is always understood to be paid for, while a mandate is always gratuitous. It resembles more nearly the contract of letting or hiring. Having treated of these matters when discussing the subjects of mandate and hiring, the present chapter will be dedicated to commercial agencies. It will be divided into seven sections, which will treat of, 1, the principal; 2, the agent; 3, the rights of the principal; 4, the liabilities of the principal; 5, the rights of the agent; 6, the liabilities of the agent; 7, the dissolution of the agency.

#### SECTION 1.—OF THE PRINCIPAL.

1272. The principal is one who being competent to contract, and who is *sui juris*, employs another to do a lawful act for his benefit, on his own account. He is called principal, constituent, or employer; and he who is thus employed is denominated the agent, attorney, proxy, or delegate of the principal.

##### § 1.—Who may be a principal.

1273. Every person is presumed, when *sui juris*, to be capable of disposing of his property, and of performing such acts in relation to it as he may deem proper, and these he may perform not only in his own person but by the interposition of another, for the acts of his agent lawfully authorized are considered as his own: *qui facit per alium facit per se*. But a person who is not *sui juris*, or who is incapable of entering into a contract, cannot be a principal and appoint another to do that for him which he could not do for himself.

##### § 2.—Of the number of principals.

1274. Sometimes several persons who have a joint interest in the subject matter of the agency appoint jointly the same person as agent to transact their

joint business. Difficulties arise when instructions are given by one person who acts on behalf of himself and others, as to the effect of such instructions. In cases of partnership, the instructions of one partner are in general sufficient authority to the agent for all the members of the firm.(a) But the rule is different with regard to persons who own a chattel in which they have a separate, distinct, though undivided interest, in such case one of them cannot appoint an agent for all; a tenant in common cannot, therefore, appoint an agent for the others, to sell the property. There is an exception as to the last mentioned rule with regard to part owners of ships; in the absence of any known dissent, each is deemed the agent of the others as to the ordinary repairs, employment and business of the ship.

## SECTION 2.—OF THE AGENT.

1275. An agent is one who undertakes, for a consideration, to manage some affair or business to be transacted for another, by the authority and on account of the latter, who is called the principal, and to render an account of it.

## § 1.—Who may be an agent.

1276. Most persons may be appointed as agents and exercise an authority delegated to them; it is not indispensable that the person be *sui juris*, or capable of acting in his own right, in order to be qualified to act as an agent for another; thus infants, *femes covert*, and aliens, may act as agents for others.(b) But to this rule an exception must be made as to lunatics, idiots, or other person *non compos mentis*, for they have

(a) *Tillier v. Whitehead*, 1 Dall. 269. As the partner cannot bind his copartner by deed, it follows that he cannot appoint an agent for both by letter of attorney under seal. *Clement v. Bush*, 3 John. Cas. 180; *Harrison v. Jackson*, 7 T. R. 207.

(b) *Bac. Ab. Authority, B*; *Com. Dig. Attorney, c. 4*; *Com. Dig. Baron & Feme, P 3*.



not the capacity to act for others any more than they can for themselves. And when a married woman acts, it must be under the express or implied consent of her husband.

There are other exceptions which apply to persons *sui juris*, who are incapable of becoming agents because they cannot assume incompatible duties and characters, nor take upon themselves the character of agents when they have an adverse interest or employment. It is a rule that no person can be an agent for another in buying goods from himself; nor can one holding a fiduciary situation, such as executor, trustee, guardian, attorney, or agent, contract with his principal, in relation to the property he holds in that capacity, as in ordinary cases where the relation does not exist.

§ 2.—Of the number of agents.

1277.—1. When the authority is given to a *sole* agent, little or no difficulty can arise, the agent alone acts for the principal; and no substitute can perform the act, unless the letter of attorney authorize a substitution.

1278.—2. But when the authority is given jointly to several persons, questions frequently arise as to whether they must all join in the performance of an act to bind the principal, or whether one or any number less than the whole, can perform any of the acts delegated to them so as to bind the principal. The following rules may be deduced from the cases on this subject:

1. When the authority is given to two or more persons to do an act, they must in general join to perform it; a letter of attorney given to two to sell property, is, therefore, not well executed by one alone. (a) But this rule is not so inflexible as to admit

(a) *Copeland v. Merchants' Ins. Co.* 6 Pick. 198; Co. Litt. 49; Com. Dig. Attorney, C 11.

of no exception; for commercial convenience it has been held that where a joint consignment of goods has been made to two factors to sell, whether they are partners or not, each of them has full power to sell or dispose of them.(a)

2. An authority given to two or more *jointly* and *separately*, must, in general, be executed by *one* alone, or by *all* the agents; it cannot be executed by several less than the whole number.(b)

3. When, from the words of the principal, it is evident that he intended to give the power to a number of persons *jointly* and *separately*, or to a number *less than the whole*, the power may be executed, according to such intent, by one, by several less than the whole, or by them all; as where the principal authorized fifteen persons by a power of attorney, "jointly and separately for him and in his name, to sign and order all such policies as they, as his attorneys, or any of them, should jointly and separately think proper," it was held, that a policy executed by four of these attorneys was binding on the principal.(c)

But these rules apply only to private agents; when the agency is of a *public nature*, the power given to several may be executed by any number of them.(d)

### § 3.—Of the kinds of agents.

1279. Agents are very numerous, but still they may be classified so as to include all those which are the most common. They are either, 1, attorneys at law; or 2, attorneys in fact.

#### *Art. 1.—Of attorneys at law.*

1280. An *attorney at law* is an officer in a court of

(a) *Godfrey v. Saund*, 3 Wils. 94.

(b) Co. Litt. 181; Bac. Ab. Authority C.

(c) *Guthrie v. Armstrong*, 5 B. & Ald. 628.

(d) Co. Litt. 181, b; Com. Dig. Attorney C 15; Bac. Ab. Authority C; *Commonwealth v. Canal Commissioners*, 9 Watts. 471; *County Commissioners v. Lecky*, 6 S. & R. 170; *Doe dem. Read v. Godwin*, 1 Dowl. & R. 259; *Townsend v. Wilson*, 3 Madd. Ch. R. 361; S. C. 1 Barn. & Ald. 608.

justice, who is employed by a party in a cause to manage the same for him. They assume different names, as they perform their functions in different courts. They are attorneys in the courts of common law; solicitors, in courts of equity; and proctors in courts of admiralty, and, in England, in the ecclesiastical courts. Attorneys are very different from counsel or advocates in England and in some of the American courts; but in most of the states the offices are blended together. The further discussion of this subject is postponed until we come to consider the courts and their officers.

*Art. 2.—Of attorneys in fact.*

1281. Attorneys *in fact* assume different names according to their employments; they are auctioneers, brokers, clerks, consignees, factors, masters of ships, ships' husbands, supercargoes, and partners. But in a more confined sense, the meaning of attorney in fact is restricted to one who is appointed by a special power or letter of attorney, so that he is appointed *in factum*, for the deed or act required to be done.

*1. Of auctioneers.*

1282. An *auctioneer* is a person authorized by law to keep an auction, and, for a consideration called a *commission*, to sell the goods of others at public sale.

He is the agent of both parties under certain circumstances. Primarily he is the agent of the seller of the goods, for until they are sold he represents no other. But the moment the goods are sold, which is signified generally by knocking down his hammer, though any other mode of showing his assent is equally binding, and inserting the name of the buyer in his books, or making a memorandum of the sale, he becomes the agent of the buyer as well as of the seller; and such memorandum will bind both parties,

as being a memorandum sufficiently signed by an agent of both parties within the statute of frauds.(a)

1283. The rights of the auctioneer are, 1st, to charge a commission for his services, when an agreement is made as to the amount, that is binding upon the parties; in the absence of any agreement, he is entitled to the usual commissions: 2dly, he has an interest in the goods sold by him, and a lien on the same, and the proceeds thereof, for his commissions; and he may sue the purchaser in his own name, or in the name of his principal.

1284. His liabilities are, 1st, to the owner for a faithful discharge of his engagements in the sale, and, if he gives credit without authority, for the value of the goods; 2dly, he is responsible for the duties due the government; 3dly, he is answerable to the purchaser when he does not disclose the name of his principal;(b) 4thly, he may be sued when he sells the goods of a third person after notice not to sell them, and if he sells stolen goods, though innocently, he is liable to the owner in an action of trover.(c)

## 2. Of brokers.

1285. *Brokers* are commercial agents, engaged for others in the negotiation of contracts, relative to property, with the custody of which they have no concern, for compensation usually called *brokerage*.

Strictly speaking, a broker is a mere negotiator between other parties, always acting in the name of his employers, and never in his own. He differs from a commission merchant, because he never has in his possession the property which is the object of the contract, and always acts in the name of his employers.

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(a) *Cleaves v. Foss*, 4 Greenl. 1; *Alna v. Plummer*, 4 Greenl. 258; *McComb v. Wright*, 4 John. Ch. 659; *Blackwood v. Leman*, Harper, 219; *Burke v. Haley*, 2 Gilm. 614.

(b) *Mills v. Hunt*, 20 Wend. 431.

(c) *Hoffman v. Carow*, 20 Wend. 21; S. C. 22 Wend. 285.

He is unlike a clerk, because he wholly supplies the place of his principal, whereas the latter attends to a part of the business, while his employer superintends the whole.

Like an auctioneer, the broker is the agent, primarily, of the party by whom he is employed, and becomes the agent of the other, only when the bargain is definitely settled, as to its terms, between the principals. He then usually gives to the buyer a memorandum of the contract signed by himself, which is called a *sold note*, and to the seller a like memorandum, then denominated a *bought note*.(a) The broker is a middle man between the parties, and although for some purposes he may be considered the agent of both, he cannot, without fraud, act for both, concealing his agency for one from the other, in a case where he is entrusted by both with a discretion as to buying and selling, and when his judgment is relied upon.(b)

A broker cannot act by deputy, because the confidence reposed in him is altogether of a personal nature.

1286. Brokers are of several sorts, according to the business in which they are employed. They are,

1. *Exchange brokers*, when they negotiate matters of exchange with foreign countries.

2. *Ship brokers* are those who transact business between the owners of vessels and merchants, who send cargoes.

3. *Insurance brokers* are those who manage the concerns of both the insurer and the insured.

4. *Pawn brokers* lend money upon goods to necessitous people, upon interest.

5. *Stock brokers* are those employed to buy and sell shares of stock in corporations and companies.

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(a) 1 Bell's Con. 435; Story on Ag. § 28. There is some confusion in the books, some calling a *sold note* that given to the seller, and a *bought note* that delivered to the buyer.

(b) A broker who disposes of bank stock for another, is the agent of both parties. *Collins v. Williams*, 3 Harr. & John. 38.

3. *Of clerks.*

1287. A *clerk* is a person employed by a merchant, manufacturer, or other person, to transact certain parts of the employer's business, while his principal superintends the whole. He always acts in the name of the principal, and is authorized to transact generally all such business as is entrusted to him, and to bind his employer, while he keeps within the bounds of his express or implied authority; (a) but the mere acting as a clerk to a merchant, does not authorize the person so acting to sign notes in the name of the master. (b)

4. *Of factors or commission merchants.*

1288. A *factor* is an agent employed to sell goods or merchandise, consigned or delivered to him, by or for his principal, for a compensation commonly called *factorage* or *commission*. (c) He is also called a commission merchant or a consignee. When he resides in the same country with his principal, he is called a *home factor*; and a *foreign factor*, when he resides in a different state or country. When he accompanies the ship taking a cargo abroad, which is consigned to him for sale, he usually assumes the name of *supercargo*. (d)

His compensation is called *factorage*, or simple commission, when he does not guarantee the safety of the buyer of the goods he sells; when he does so guarantee the sale, a higher compensation is given to him, known by the name of *del credere* commission. (e)

Being entrusted, in consequence of some personal confidence, a factor cannot delegate his authority to

(a) *Portland v. Lewis*, 2 S. & R. 197; *Eagle Bank v. Smith*, 5 Conn. 71.

(b) *Terry v. Fargo*, 10 John. 114.

(c) *Paley on Ag.* 13; *Liv. on Ag.* 68; *Story on Ag.* § 33; 1 *Bell's Com.* 385; 3 *Chit. Com.* 193; *Baring v. Corrie*, 2 B. & Ald. 143.

(d) *Liv. Ag.* 69, 70; *Beaw. Lex Mer.* 44; 1 *Domat*, b. 1, t. 16, § 3, art. 2.

(e) This is an Italian phrase, which signifies that the agent *believes* the buyer to be good. In the French law, the expression used, which has the same meaning as that in Italian, is *ducroire*. 2 *Pardes. Dr. Com.* n. 564.

another, though he may employ clerks under him to transact the business.

5. *Of the ship's husband.*

1289. This is an agent appointed by the owners of a ship, and invested with authority to make the requisite repairs, and attend to the management, equipment and other concerns of the ship; he is generally authorized as the general agent of the owners in relation to the ship in her home port. By some authors it is said the ship's husband must be a part owner.<sup>(a)</sup>

By virtue of his agency, he is authorized to direct all proper repairs, equipments, and outfits of the ship; to hire the officers and crew; to enter into contracts for freight or charter of the ship, if that is her employment; and to do all other necessary and proper acts, to prepare and dispatch her for her intended voyage.<sup>(b)</sup>

6. *Of masters of ships.*

1290. The master of a ship is the person who has the command of her, and is generally known by the name of *captain*. The powers delegated to this agent depend, of course, upon the express authority given to him; sometimes he is appointed supercargo and consignee of the cargo, in which case, he has more duties to perform than usually belong to him, and then the rights and duties arising from this extra business are treated as distinct, as if the acts appropriated to each character were confided to different persons.

His general powers are to choose his crew, and this is but reasonable, because he is responsible for their acts; but a just deference to the rights of the owner requires that he should be consulted, as he, as well as the master, is responsible for the acts of the crew. He

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(a) Hall on Mar. Loans, 142, n.; Abbott on Shipp. part 1, c. 3, s. 2.

(b) 1 Liverm. on Ag. 72, 73; Story on Ag. § 35; 1 Bell's Com. 503, 5th ed.

may repair the ship, and if he is not in funds to pay the expenses of such repairs, he may borrow money, when abroad, on the credit of the owners of the ship.(a)

On board, the master is invested with almost arbitrary power over the crew, being responsible for the abuse of his authority.(b)

#### 7. Of partners.

1291. From the nature of the contract of partnership, the partners are presumed to be the *agents of each other*, with respect to the partnership business carried on in the usual manner. Every time a partner makes a sale, it is not requisite he should get the consent of his copartner; this is supposed to have been given to him.(c) But this presumed authority is confined to the usual partnership business; a partner cannot, therefore, make a conveyance of the real estate of the firm, nor bind his copartner by deed.(d) And, as a general assignment for the benefit of creditors puts an end to the partnership, it is doubtful whether one partner has an implied authority to make such an assignment so as to bind the firm.(e)

#### 8. Of public agents.

1292. Hitherto we have spoken only of private agents; public agents stand upon very different grounds. As a general rule, a public agent is not responsible individually, when he contracts on behalf of the state.(f) A public officer, acting in his official

(a) Abbott on Ship. 127; Bowy. Mod. Civ. Law, 297.

(b) Abbott on Ship. 162.

(c) Wats. on Partn. 167; Gow. on Partn. 53. A partner may act as the agent of another firm, in the same town, of which his copartner is also a member, and notice to the copartner binds such other firm. Wilkin v. Boyd, 3 Watts, 39.

(d) Wats. on Partn. 218; Gow on Partn. 83.

(e) Pearpoint v. Graham, 4 Wash. C. O. 232; Story on Partn. § 101.

(f) Tutt v. Lewis, 3 Call. 233; Adams v. Whittlesey, 3 Conn. 560; Walker v. Swartwout, 12 John. 443; Osgood v. Grosvenor, 1 Root, 89.



capacity, is presumed to act on behalf of the government, although he may sign the contract in his own name. And, as he is not responsible, so the agent cannot enforce the contract entered into by him, the suit must be brought in the name of the government.(a)

The contract by the agent may be by parol or under seal, and still the agent will not be bound, if known to act for the government.(b)

This general presumption, that a public agent acts for and on behalf of the state, may be rebutted by showing expressly, or otherwise, that in making the contract, the agent did not act as a public agent, but in his own private capacity; and then he will be liable upon the contract, and may enforce it.(c)

§ 4.—Of the mode of appointing agents.

1293. The appointment of an agent is the authority by which the principal delegates to the agent the power to act for him. This may be done in two ways: 1, by an express; and, 2, by an implied appointment.

*Art. 1.—Of an express appointment.*

1294. Formerly it was considered necessary that the appointment should be by deed, that it might appear that the attorney, or his substitute, had a commission or power to represent the party, and also, that it might appear that the authority had been well pursued.(d) In modern times, however, and particularly in commercial transactions, it is not now requisite that the appointment should be by deed, and it

(a) *Macbeath v. Haldimand*, 1 T. R. 172, 180; *White v. Bennett*, 1 M. 102.

(b) *Unwin v. Woolseley*, 1 T. R. 674; 12 John. 444; *Hodgson v. Dexter*, 1 Cranch, 345, 363.

(c) *Swift v. Hopkins*, 13 John. 313; *Olney v. Wickes*, 18 John. 122; *Sheffield v. Watson*, 18 John. 122.

(d) *Bac. Ab. Authority A.*

may be given, either by writing not under seal, or by a mere correspondence, or simply by parol.

The old rule, however, is still considered in full force, when the attorney is authorized to perform an act by deed, as to convey real estate; then the authority must be by deed. A mere unsealed writing will not be sufficient at law, though a court of equity might, in such case, compel the principal to confirm the deed.(a) But the principle is not carried out, by requiring that when the act to be done is to be in writing, unsealed, it should be authorized in writing, for it may be done by parol.(b)

When the authority is express, the agent is bound to execute the power according to the trust reposed in him, and any act beyond that authorized, would be done without authority, because no man can be bound without his consent.(c) But the principal will be bound when he has by his acts induced the opinion that he has given more extensive powers than were in fact given.(d)

*Art. 2.—Of implied appointments.*

1295. But the most usual mode of making appointments is not by writing, sealed or unsealed, or even expressly by parol. It is implied from the acts of the parties; and such an appointment has as much binding force as the most formal delegation, except when, as we have seen, the authority must be given by deed. Take the case of a clerk in a store; he sells goods and transacts business for his employer, in his presence, without having received any express authority in writing, or otherwise; his acts, in the course of the usual business of the employer, will be presumed to

(a) *Harrison v. Jackson*, 7 T. R. 203; *Berkley v. Hardy*, 5 B. & Cr. 355.

(b) *Paley on Ag.* by Lloyd, 160; *Anon.* 12 Mod. 564.

(c) *Welsh v. Parish*, 1 Hill, S. C. 155.

(d) *Schimmelpennick v. Bayard*, 1 Pet. 264.

have received his sanction ; a sale made by him, or the receipt of money by him from a customer, will bind the principal. The obligation, in such cases, is contracted by the mere consent of the parties ; *obligatio mandati, consensu contrahentium consistit.*(a)

1296. Though formerly a corporation could not appoint an agent in any other way than by deed, now, for all lawful purposes, it may delegate its authority, by expressly bestowing power to an agent, by writing, without seal, by parol, or such authority may be implied from its acts.(b) A corporation is therefore liable for the acts and omissions of its agents in their appropriate duties, but not for their acts out of the scope of their employment.(c)

§ 5.—Of the authority of the agent.

1297. By *authority* is meant the lawful delegation of power by one person to another. We have seen that as to its delegation the authority is express or implied. With regard to its extent, it is general or special ; as to its object, it is lawful or unlawful ; and as to the right it confers, it is either a naked authority or an authority coupled with an interest.

*Art. 1.—Of general and special authority.*

1298.—1. A *general* authority is one which extends to all acts connected with a particular employment, embracing an indeterminate power. A general agency may be express, as when the principal authorizes his agent to transact all his business whatever, in direct terms ; or it may be implied, as when the principal permits the agent to do all manner of acts for him, as to buy and sell goods, to collect debts, to draw bills or

(a) Dig. 17, 1, 1.

(b) *Bank of Columbia v. Patterson's admr.* 7 Cranch, 299 ; *Bank of U. S. v. Dandridge*, 12 Wheat. 64.

(c) *Salem Bank v. Gloucester Bank*, 17 Mass. 1 ; *Foster v. Essex Bank*, 17 Mass. 479 ; *Minor v. Bank of Alexandria*, 1 Pet. 70 ; *Lowell v. Boston and Lowell R. R.* 23 Pick. 24.

other commercial papers, to rent his estate, and all such other acts, and, from time to time, approves of and ratifies such acts, he will be bound by any future similar acts of the agent.(a) But a man may be a general, without being a *universal* agent; and general language, giving the most extensive agency, will be confined within such bounds as to make the agent a general, and not a universal agent. If, for example, a merchant going abroad, for a temporary purpose, should give a letter of attorney, authorizing his agent to buy and sell any property for him, and generally to make contracts in his name; this would be construed as an authority to buy and sell only, in his ordinary business as a merchant, and would not authorize the agent to sell the principal's furniture, or to convey his real estate.

1299.—2. A *special* agent is one whose authority is confined to a particular, or an individual instance;(b) but in another sense, it may be said that every express agency is special, because it specifies what is to be done. It is a general rule that he who is invested with a special authority must act within the bounds of his authority, and he cannot bind the principal beyond what he is authorized to do.(c)

But although by a special authority the power is limited, so as to confine the agent within it, yet there are cases where he may exceed these limits. Whenever one person places another in a certain official situation, or relation to himself, or employs a professional agent and delegates to him only limited power, the latter may yet bind his principal to the extent of

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(a) *Munn v. Commission Company*, 15 John. 44; *Tradesman's Bank v. Astor*, 11 Wend. 87; *Williams v. Mitchell*, 17 Mass. 98; *Wilkins v. Commercial Bank*, 6 How. Miss. 217.

(b) *Whitehead v. Tuckett*, 15 East, 400, 408.

(c) *Batty v. Carswell*, 2 John. 48; *Allen v. Ogden*, 1 Wash. C. C. Rep. 174; *Nixon v. Hyserott*, 5 John. 58; *Heyden v. Middlesex Turnpike*, 10 Mass. 397; *Munn v. Commission Co.* 15 John. 44; *Rossiter v. Rossiter*, 8 Wend. 494.

the power usually incident to the relation in which the agent has been placed. For example, if a factor, broker or auctioneer, be employed by the principal, and he limits their authority by private instructions, still the agent has power to bind his principal, to the full extent of his usual authority, in dealing with those who have no notice of the limitation,(a)

In certain cases the agent is vested with an authority by his appointment, and secret instructions are also given him with regard to the mode of executing the power; the instructions being confined as to the exercise of the authority, but not intended to abridge it. In these cases, a third person claiming under the executor of the apparent power, is not affected by private instructions of which he had no notice.(b)

1300. The *usages* of a particular trade or business, or of a particular class of agents, are included in the power which is bestowed upon them; and, in the construction of those powers, these are considered, not to enlarge the power, but to constitute its extent.(c)

The authority of an agent includes in it, as an incident, all the powers necessary, proper or usual, as the means to effectuate the purposes for which it was created.

But this general authority does not authorize an agent to appoint another person in his place to perform the subject of his agency, *delegata potestas non potest delagari*;(d) or, as is otherwise expressed, *vicarius non habet vicarium*, a delegated power cannot be again delegated.(e) Thus, if a principal employs a broker, from the opinion which he entertains of his personal

(a) *Sandford v. Handy*, 23 Wend. 260, 266; *Nickson v. Brohan*, 10 Mod. 109; *Pickering v. Busk*, 15 East, 38, 44; *Story on Ag.* § 126, and note; 1 *Hare & Wall*, Sel. Dec. 400; *Hough v. Doyle*, 4 Rawle, 291; *Shelhamer v. Thomas*, 7 S. & R. 106.

(b) *Withington v. Herring*, 5 Bing. 442.

(c) *Story on Ag.* § 77.

(d) 2 Inst. 597; *Factor v. Beacon*, 5 Bingham N. C. 310.

(e) *Branch's Max.* 38; *Broom's Max.* 384.

skill and integrity, the broker has no right, without notice, to turn his principal over to another, of whom he knows nothing; and, therefore, a broker cannot, without authority from his principal, transfer consignments made to him, in that character, to another broker for sale.(a)

*Art. 2.—Of the lawfulness or unlawfulness of the authority.*

1301. The business to be transacted must be such as the law sanctions; a principal cannot, therefore, authorize an agent to do an unlawful act, for no one has a right to empower another to violate the law;(b) and the agent is not only bound to obey the laws to which he is personally subject, but he must follow those of the place where the business is transacted.(c) If the agent act pursuant to an unlawful authority, he will not be protected by it, but both he and his principal may be sued; if, for example, Peter authorize Paul to commit a trespass on the person or property of James, Paul will not be protected by the authority, and both he and Peter may be sued by James, in an action of trespass.(d) And in such case the agent has no remedy against his principal, although at the time the act was committed, it was not known to be a trespass, a promise of indemnity will not be implied; neither, in such case, is there any ground of contribution, if the whole damages recovered for the trespass be levied against the agent,(e) for there is no contribution among joint wrong doers.(f)

(a) *Cochran v. Irlam*, 2 M. & S. 301, note (a); *Solly v. Rathbone*, 2 M. & S. 298.

(b) *State v. Matthis*, 1 Hill, S. C. 37.

(c) *Owing v. Hull*, 9 Pet. 607.

(d) *Freebrother v. Ansley*, 1 Campbell, 343.

(e) 1 Campb. 343.

(f) *Merryweather v. Nixon*, 8 T. R. 186.

*Art. 3.—Of a naked authority, and an authority coupled with an interest.*

1302.—1. A *naked* authority is where the principal delegates the power to the agent, wholly for the benefit of the former. In such case the agent must perform the act himself, and cannot delegate his authority to another, because this is a trust reposed in him personally; the maxim in such cases being *delegata potestas non potest delegari*.(a)

1303.—2. An *authority coupled with an interest* is when it is given to the agent for a valuable consideration, or when it is a part of a security. It is evident that the right of the agent is very different in these several cases; when he has but a naked authority he must act wholly for the benefit of the principal; when, on the contrary, his agency is coupled with an interest, he acts for himself as well as for the principal, and he may appoint a substitute to act in his place; when the agent has but a naked authority, if he were to appoint a substitute, there would be no privity between the principal and the substitute; in case of the appointment of a substitute by one who has a power coupled with an interest, there is a privity between the agent, who has an interest, and the substitute. There is still another difference; a naked authority may be revoked, whilst an authority coupled with an interest is irrevocable.(b)

*Art. 4.—Of the execution of the authority.*

1304. Having considered the nature of the authority of an agent, it is next to be considered how it is to be executed. In the pursuit of this inquiry it will be requisite to examine, 1, by whom the authority must be executed; 2, in what manner; 3, in what time.

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(a) 2 Inst. 597.

(b) Bac. Ab. Authority, E. Bouv. ed.

1. *By whom the authority must be executed.*

1305. An authority is given because confidence is reposed in the personal qualifications of the agent; it must, therefore, be executed by him and no one else, unless there is a power given to the agent to appoint a substitute or sub-agent, or by the usages of trade, or the requirements of the law such sub-agent must be appointed. If, for example, the principal should direct his goods to be sold by auction, and, by the laws of the place, the sale can be made by none but a licensed auctioneer, the authority to substitute him in the agency, so far as the sale is concerned, would be implied.(a) Again, when by the custom of trade, a ship broker is usually employed to procure freight, the master of a ship authorized to let the ship on freight has, incidentally, the authority to employ a ship broker for that purpose. But in usual cases the rule is that a delegated power cannot be again delegated, *delegata potestas non potest delegari*.

When treating of the number of agents, we considered their power to execute an authority. It will not be required here to say any thing further upon the subject.(b)

2. *How the authority is to be executed.*

1306. It is a general rule, in cases of contract, that it must purport upon its face to be the contract of the principal, and his name must be inserted in it and signed to it, and not merely the name of the agent, even though the latter be described as agent in the instrument. In cases of instruments under seal, the agent must do the act in the name of the principal, and not in his own name, nor as his proper act, and this seems to have been the ancient rule on this subject in every case.(c) A deed executed as follows, namely:

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(a) *Laussat v. Lippincott*, 6 S. & R. 386.

(b) Book, 2, p. 1, t. 5, c. 24, s. 2, § 2.

(c) *Combe's case*, 9 Co. 75, 77; *Com. Dig. Attorney C. 14*.



"I, A B, as agent of C D," or signed "A B for C D," is the deed of the agent, and not of the principal.(a) For the same reason the deed of a corporation must be sealed with the seal, not of the attorney, but of the corporation.(b)

But when the act can be done *in pais*, or in any other manner than a written instrument, under seal, then the act will be construed, if the words used will bear that construction, as most effectually to accomplish the end required by the principal.(c) The proper mode of executing such instruments, undoubtedly is to sign the name of the principal, and add, by his agent, thus: "A B, (the principal,) by C D," (the agent.) If it appear from the form of the contract that it was the intention to bind the attorney, he will alone be responsible; as where a contract was made "by C D, attorney for A B;"(d) or when the agent makes the contract without mentioning the name of his principal; as if a broker should sell goods, and draw upon the buyer for the amount in his own name, in favor of his principal, if the bill should be dishonored, he would be personally liable, unless some special words were used in the bill to prevent it; and this liability would not only extend to third persons, although he was known to be a mere agent, but also to his principal; because upon its face the bill imports a personal liability as drawer, in favor of all persons who are or may become parties to it.(e)

1307. It is proper here to note a distinction between the power of an agent and of a deputy, in executing

(a) Bac. Ab. Leases J. 10; Com. Dig. Attorney C. 14; Paley on Ag. 180, 181; Story Ag. § 148; Spencer v. Field, 10 Wend. 87; Copeland v. Mercantile Ins. Co., 6 Pick. 198; Fowler v. Sherman, 7 Mass. 14; Couch v. Ingersoll, 2 Pick. 292.

(b) Bank of Columbia v. Patterson's admr. 7 Cranch, 299; Daman v. Granby, 2 Pick. 345.

(c) Paley on Ag. 181.

(d) Spencer v. Field, 10 Wend. 87. See Bac. Ab. Authority, C. Bouv. ed.

(e) Bayley on Bills, 68; Lefevre v. Lloyd, 5 Taunton, 749; Stackpole v. Arnold, 11 Mass. 27; Mayhew v. Prince, 11 Mass. 54.

an authority in their own names. An agent can bind his principal only when he does an act in the name of the latter. But a deputy, being invested by the law with all the power of his principal, may do a binding act upon the latter, and sign his own name: (a) the case of an under sheriff is an exception to this rule, for he must act in the name of the high sheriff, because the writs are directed to him. (b)

3. *Within what time an authority must be executed.*

1308. To bind the principal, the authority delegated to the agent must subsist, for if it has been revoked, either expressly or by implication, the agent's power to bind his principal ceases. What will be a determination of the agency will be examined in another place. (c)

*Art. 5.—Of the ratification of the agent's acts.*

1. *Nature of ratification.*

1309. The acts of an agent, who has performed them without sufficient authority from his principal, are not in general binding upon the latter, and he may repudiate them; in that case the agent becomes liable to the persons with whom he dealt, and the principal is discharged. Where the agent had authority and exceeded it, the principal will be bound to the extent of his authority, and the agent for the remainder. But when the principal, upon a full knowledge of all the circumstances of the case, deliberately ratifies the acts, doings, or omissions of the agent, he will be bound by his ratification, as fully to all intents and purposes, as if he had originally given direct authority in the premises, to the extent of those acts, doings, and omissions. By *ratification* is understood the adoption and

(a) *Craig v. Radford*, 3 Wheat. 594; *Parker v. Kett*, Salk. 95. But see 9 Co. 49.

(b) Salk. 95.

(c) See post, sec. 7, of this chapter.

approval by one person of the acts of another done in his name or behalf.

2. *By what acts a ratification may be made.*

1310.—1. Ratification may be express or implied. When there is an *express* confirmation of the transaction there can be little doubt on the subject. When the act of the agent has been under seal, the ratification must also be by seal.(a) In other cases when the instrument of ratification is in writing, however informal it may be, if it appears that an express ratification was intended, it will be sufficient.

1311.—2. But it is not required that the ratification should be express, it may be *implied* from the acts of the principal *in pais*. These acts are generally construed liberally in favor of the agent, and but slight or small matters will be sufficient to raise a presumption of ratification; and when his acts can bear no other interpretation, they become conclusive. If, for example, an agent who is employed to buy goods at a certain price, should exceed the limit, and the principal, after a full knowledge of the facts, should receive them on his own account without objection, this would be a strong presumption of the ratification; if the goods had been bought on credit, and he gave his notes for the amount of the purchase money, this would be conclusive; and if, afterward, he should sell the goods so bought, it would be impossible for him to resist the presumption.(b)

1312. The *bringing an action* by the principal against a third person, to compel the performance of an unauthorized act of the agent, will be considered as a ratification; as when the agent sold goods without authority,

(a) *Bloodgood v. Goodrich*, 9 Wend. 68; *S. C.* 12 Wend. 565; *Hanford v. McNair*, 9 Wend. 58.

(b) *Paley on Ag.* by Lloyd, 113 to 115; *Story on Ag.* § 253; *Clark's Ex'rs v. Van Reimsdyk*, 9 Cranch, 153; *Ruggles v. Washington County*, 3 Mis. 496; *Bell v. Cunningham*, 3 Pet. 81; *Shiras v. Morris*, 8 Cow. 60.

or below the limited price, and the principal brought suit against the purchaser to recover the price ;(a) or if a factor should sell goods for a price below the limits, and afterward the principal should sue him for the money received by him upon such sale, that would amount to a ratification.(b)

1313. *Silence* itself will sometimes operate as a ratification, particularly when the principal is bound to speak ; thus receiving notice of the acts of an agent, without objection, will be a ratification, unless the notice came too late to prevent the effect of those acts ;(c) and long acquiescence, without objection, will have the same effect : where an agent, without authority, compromised a debt of his principal, who, after a full knowledge of the fact, made no objection, and acquiesced in the act for a length of time, he was, therefore, held bound by it.(d)

Whether silence operates as a presumptive proof of ratification frequently depends upon the particular relations between the parties, the habits of business, and the usages of trade, which have always an important bearing on the construction of commercial contracts. Between merchants and their correspondents, it is the duty of one party, receiving a letter from another, to answer the same within a reasonable time ; and if he does not, it is generally presumed that he admits the propriety of the acts of his correspondent, and confirms and adopts them ; if, therefore, the principal, having received information, by a letter from his agent, of his acts, touching the business of his principal, does not express his dissent to the agent within a reasonable time, it is presumed that he approves of his acts by his silence. Indeed, this seems so natural

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(a) *Gaines v. Acre*, Minor, 141 ; *Hampshire v. Franklin*, 16 Mass. 76.

(b) *Paley on Agency*, by Lloyd, 172, 173.

(c) *Shaw v. Nudd*, 8 Pick. 9 ; *Amory v. Hamilton*, 17 Mass. 103.

(d) *Armstrong v. Barnwell*, 2 John. Cas. 424.

a consequence, that perhaps most civilized states have adopted the same rule.(a)

1314. A ratification will also be inferred from the mere *habit of dealing* between the parties; if a broker has been accustomed to settle losses on policies in a particular manner, without any objection being made, or with the silent approbation of his principal, and he should afterward settle other policies in the same manner, to which no objection should be made within a reasonable time, a just presumption would arise of an implied ratification, even though the principal might, in some other cases, have objected to this mode of settlement, for if he did not agree to such settlement, he should have declared his dissent.(b)

### 3. *Of the effects of a ratification.*

1315. The acts upon which the ratification takes effect, may be classed into, 1, those where the party acting had no authority; 2, those where he had authority, and exceeded it; 3, those which are void and voidable; and, 4, those which relate to the extent and time of ratification.

#### 1° *When the party had no authority to act.*

1316. In cases when the party had no authority whatever to act with the goods or property, and he has used them and converted them into money, the owner may treat him as a trespasser, or, waiving the tort, consider him as his agent and ratify his acts. In this, as in every other case of confirmation or ratification, the act of the owner will be a renunciation of all other rights he had, except the agency, and will render that valid, which before was voidable.(c) It is a maxim

(a) 1 Emerigon, Assur. c. 5, § 6; Dig. 14, 6, 16; Casaregis, Disc. 102, n. 54; Dalloz, Dict. de Jur. Ratification, art. 1, n. 9.

(b) Paley on Ag. by Lloyd, 280.

(c) Wood v. Carpenter, 4 Wend. 219; Odiorne v. Maxcy, 13 Mass. 178, 182; S. C. 15 Mass. 39; Frothingham v. Haley, 3 Mass. 68.

that subsequent assent, given to what has been already done, has a retrospective effect, and is equivalent to a previous command: *omnis ratihabitio retrò trahitur, et mandato priori equiparatur*; (a) an act of an agent, which, if authorized, would have given an action to a third person for damages against the principal, when subsequently ratified by him, will give the same right against him as if it had been so authorized; for the ratification relates back to the time of the inception of the transaction, and has a complete retroactive effect. (b)

It may be laid down as a well known rule of law, that an act done for another, by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently adopted and ratified by him. In this case, the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or contract, to the same extent, and with all the consequences which follow from the same act, if done by previous authority. (c)

1317. But there are some acts of an unauthorized person which cannot be ratified, so as to give validity, against third persons, by relation, because that would operate injustice toward them. The following are examples :

1. A notice to quit by a person having no authority to give it, cannot by a subsequent ratification be made valid to determine a lease, and the reason assigned for this is, that on receiving such notice, the tenant is entitled to know with certainty whether he will or will not be required to quit. (d)

(a) Co. Litt. 207 a. 258 a.

(b) Rogers v. Kneeland, 10 Wend. 248.

(c) Wilson v. Tummon, 6 Scott, N. R. 894, 904. See 1 M. & S. 590; 6 Scott, N. R. 897; 9 East, 281; 4 B. & Ad. 616.

(d) Right ex dem. Fisher v. Outhell, 5 East, 491; Doe ex dem. Mann v. Walters, 10 B. & Cr. 626.

2. A demand of a debt by an unauthorized person, cannot be ratified by the creditor, so as to take away the right of the debtor to plead a prior tender, because such unauthorized person had no right to give a discharge.(a) For the same reason a demand by a stranger, of goods, will not be evidence of a conversion,(b) and the demand of payment of a bill of exchange or a promissory note by such a stranger, will not constitute a good demand upon the party, so as to make him liable for damages for his default,(c) although in both instances the acts were ratified by the principal.

2° *When the agent has exceeded his authority.*

1318. It not unfrequently happens that an agent, having a special authority, exceeds the powers given to him, either by design or through inadvertence; in these cases, the principal is bound to the extent of his authority, but no further; if, being fully aware of all the circumstances, he ratifies the acts of the agent, he will be as fully bound as if he had originally given him authority, and he will be entitled to all the advantages resulting from the agent's acts;(d) but if the ratification be made by the principal, without such knowledge, it will not be obligatory upon him, whether the absence of such knowledge arise from the designed or undesigned concealment, or misrepresentation of the agent, or from his mere inadvertence.(e)

1319. When the agent has appointed a sub-agent without authority, and the principal afterward ratifies the act of the sub-agent, such an act will have the

(a) *Coles v. Bell*, 1 Camp. 478, note; *Coore v. Callaway*, 1 Esp. 115.

(b) *Solomon v. Dawes*, 1 Esp. 83.

(c) *Freeman v. Boynton*, 7 Mass. 483; *Bank of Utica v. Smith*, 18 John. 230.

(d) *Den v. Wright*, Pet. C. C. Rep. 64; *Vanhorne v. Frick*, 6 S. & R. 90; *Courcier v. Ritter*, 4 Wash. C. C. 549; *Cox v. Robinson*, 2 Stew. & Port. 91; *Towle v. Stephenson*, 1 John. Cas. 110.

(e) *Bell v. Cunningham*, 3 Pet. 69; *Copeland v. Merchants' Ins. Co.*, 6 Pick. 202; *Horsfall v. Fauntleroy*, 10 B. & Or. 755.

effect to confirm the acts of the agent in the appointment.(a)

3° *What acts void or voidable may be ratified.*

1320. Before we proceed to examine the effect of ratification on acts void or voidable, it will be proper to ascertain what kind of acts may be classed as void, and what are voidable.

1321. A *void* act is one which has no force and effect, and life can never be infused into it; such as is declared void by statute, or because it is immoral or against public policy. An act of this kind can never be confirmed; *quod ab initio non valet in tractu temporis non convalescit*, that which was originally void does not by lapse of time become valid. But there are acts of an agent which are void, only conditionally; they are void as to the principal, if he does not sanction them, but they are valid as to him, at least, and frequently as regards others, if he confirms them. When we speak of void acts, in this connection, acts of the first class only are intended.

1322. A *voidable* act is one which has some force or effect, but which, in consequence of some inherent quality, may be legally annulled and avoided.

When an act is void in the sense above given to the word, it is clear it cannot be ratified; but if it is merely voidable, it may be ratified by the principal, and such ratification shall have effect as if it had been originally authorized; but it must be remembered that it must be ratified by the same formality which would have been required in the original authority. If the act of the agent has been by deed, the ratification must be under seal.

4° *Of the time and extent of the ratification.*

1323. The moment the ratification is made upon

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(a) Paley, Ag. by Lloyd, 171.



deliberation, and knowledge of the facts and circumstances by the principal, it becomes, *eo instanti*, obligatory, and cannot be revoked or recalled by the principal.(a)

As the act of the agent is a unit, the principal must ratify the whole or none; he cannot confirm a part, and reject the other, and if he attempt to do so, his act will be a ratification of the whole.(b)

### SECTION 3.—OF THE RIGHTS OF THE PRINCIPAL.

1324. The rights to which the principal is entitled as such, arise from obligations due to him by the agent or by third persons.

#### § 1.—Of the principal's rights against the agent.

1325.—1. The principal has a right to call upon his agent at all times for an account, in relation to the business of the agency. It is an implied agreement in every contract of agency, that the agent shall keep a clear account, not only of his disbursements, but also of his receipts,(c) and this should contain not only what has been received, but also all increase which has been made from the property.(d) The account must be made without suppression, concealment or overcharge.(e)

1326.—2. When the agent violates his obligations to his principal, either by exceeding his authority, or by positive misconduct, or by mere negligence, or omission in the discharge of the functions of his agency, or in any other manner, and any loss or damage falls on his principal, the latter will be entitled to full

(a) *Smith v. Cologan*, 2 T. R. 189, note.

(b) *Smith's Mer. Law*, 60; *Ferguson v. Carrington* 9 B. & Cr. 59.

(c) *White v. Lady Lincoln*, 8 Ves. 369; *Morgan v. Lewes*, 4 Dow, 52.

(d) *Brown v. Litton*, P. Wms. 141; *Diplock v. Blackburn*, 3 Campb. 43.

(e) *Paley on Ag.* 48.

indemnity.(a) But he is entitled to nothing more. In an action against an attorney for not charging the defendant in execution, where the debt was £3000, the plaintiff was held not to be entitled to the whole amount of the plaintiff's original claim, but to what the jury found to be full indemnity, £500, that being the amount which could have been recovered from the original defendant.(b)

1327.—3. In those cases where both the principal and agent may bring an action against a third person, for any matter relating to the agency, the principal has a right to supersede the agent by suing in his own name; and he may by his own intervention intercept, suspend, or extinguish the right of the agent under the contract.(c) But this rule is limited by considerations of reciprocal justice and equity. When the agent has acquired a lien or other claim on property in his hands, and he sells it, his right is extended to the price for which such goods were sold.(d) To entitle the agent to this privilege, he must give notice of it to the purchaser before he has paid the principal, or before he has obtained a right of set off against him.(e)

§ 2.—Of the principal's rights against third persons.

1328.—1. When a contract is made by an agent with a third person in the name of his principal, the latter may enforce it by action. But to this rule there are the following exceptions:

1st. When the instrument is under seal, and it has been exclusively made between the agent and the third person; as, for example, a charter party or bottomry bond; in this case the principal cannot sue on it.(f)

(a) Paley on Ag. 7, 71, 74.

(b) Russell v. Palmer, 2 Wils. 325. See Purviance v. Angus, 1 Dall. 180.

(c) Paley, Ag. 362; 1 Liv. on Ag. 226.

(d) 3 Chitty Com. Law, 211; Smith on Merc. Law, 77.

(e) Drinkwater v. Goodwin, Cowp. 251.

(f) Shack v. Anthony, 1 Maule & Selw. 573; Story on Ag. § 422.

2dly. When an exclusive credit is given to and by the agent, and, therefore, the principal cannot be considered in any manner a party to the contract, although he may have authorized it, and be entitled to all the benefits arising from it. The case of a foreign factor, buying and selling goods, is an example of this kind : he is treated, as between himself and the other party, as the sole contractor, and the real principal cannot sue nor be sued on the contract. This, it has been well observed, is a general rule of commercial law, founded upon the known usages of trade ; and it is strictly adhered to for the safety and convenience of foreign commerce.(a)

3dly. When the agent has a lien or claim upon the property bought or sold, or upon its proceeds, as above explained.

1329.—2. But contracts are not unfrequently made without mentioning the name of the principal ; in such case he may avail himself of the agreement, for the contract will be treated as that of the principal as well as of the agent,(b) for it is a rule that when the principal can trace his property into the hands of his agent or factor, whether it be the identical article which first came to the hands of the factor, or other property purchased for the principal by the factor with the proceeds, he may follow it, either in the hands of the factor, or of his legal representatives, or of his assigns, if he should become insolvent or bankrupt.(c)

1330.—3. Third persons are also liable to the principal for any tort or injury done to his property or rights in the course of the agency.(d)

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(a) Story, Ag. § 423 ; *Thompson v. Davenport*, 9 B. & Cr. 87 ; *Patterson v. Gandassequi*, 15 East, 62 ; *Addison v. Gandassequi*, 4 Taunt. 574 ; *Smith, Mer. Law*, 66.

(b) Story on Ag. §§ 109, 111, 403, 410, 417, 440 ; *Paley*, Ag. 21, 22.

(c) *Veil v. The Admr. of Mitchell*, 4 Wash. C. O. 105, 106.

(d) *Paley*, Ag. 363 ; *Story*, Ag. § 436.

## SECTION 4.—OF THE LIABILITIES OF THE PRINCIPAL.

1331. The liabilities of the principal are to his agent or to third persons.

## § 1.—Of the principal's liability to his agent.

1332.—1. The principal is bound to reimburse his agent for all expenses he may have lawfully incurred about the agency. This will be more fully examined when we come to consider the rights of agents.

1333.—2. The principal is liable to the agent for all damages he may have sustained in the course of the agency; but to give rise to this obligation, it is necessary that the agent should have sustained some loss, on account of the agency, *ex causa mandati*, and that the loss should not have been caused by the agent's fault.(a)

1334.—3. He is also bound to pay the agent the commissions agreed upon, or according to the usages of trade, except in cases of mandates or gratuitous agencies.(b)

## § 2.—Of the principal's liability to third persons.

1335.—1. The principal is bound toward third persons to fulfil all engagements made by the agent, for and in the name of his principal, and which come within the scope of his authority; because what is done by an agent properly authorized is the act of the principal, *qui facit per alium facit per se*; and besides it is only justice that he who reaps the benefit of a contract, should be bound to fulfil his part of the engagement. But to this general rule there are exceptions, some of which will here be noticed.

1st. If the principal and agent are both known, and

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(a) *Elliott v. Walker*, 1 Rawle. 126; *D'Arcy v. Lyle*, 5 Binn. 441. See *Ramsay v. Gardner*, 11 John. 439; *Stocking v. Sage*, 1 Conn. 519.

(b) *Story*, Ag. § 323; *Story*, Bailm. 153, 154, 196 to 201.

the credit is given exclusively to the latter, the principal will not be liable.

2dly. When the purchase of goods is made by a foreign factor, the credit given to him is exclusive, and the principal is not responsible.

3dly. And even in the case of a domestic factor, when the credit is given exclusively to him, the principal will not be bound.(a)

4thly. When the contract is made in the name of the agent, and the name of the principal is not disclosed at the time, and in the mean time he has settled with the agent, without any suspicion of his own personal liability; or if, by the state of the accounts between them, the agent appeared to be in debt to the principal, the latter will not be bound.(b)

5thly. When the vendor by his acts has induced the principal to believe he would not be looked to for payment, the latter will be discharged; as, where he gave the agent a receipt, or took a negotiable security from the agent payable at a future day.(c)

6thly. Another exception arises from the form of the contract, for although the act may have been authorized, yet the principal can neither sue nor be sued; as, for example, when the contract is under seal and made in the name of the agent only.(d)

1336.—2. The principal is liable to third persons in consequence of the acts of his agent, upon the obvious maxim already mentioned, that he who acts by another acts by himself; *qui facit per alium facit per se*. In the following cases, the acts of the agent, or of others toward the agent, bind the principal.

1. A delivery of goods to an agent is a delivery to the principal; a delivery to the servant of a carrier, in

(a) Story, Ag. § 448; Paley, Ag. by Lloyd, 245, 246.

(b) Thompson v. Davenport, 9 B. & Cr. 88; Paley, Ag. by Lloyd, 246.

(c) Story, Ag. § 449.

(d) Ante, sec. 3, § 2, of this chapter.

the course of his employment, is a delivery to the carrier himself.(a)

2. Payment made by a third person to an agent, in the course of his employment, is a payment to the principal.(b)

3. A tender to an authorized agent, is a tender to the principal.(c)

4. Notice to an agent, in the course of his employment, is notice to the principal.(d)

5. The representations, declarations and admissions of an agent, in the course of the agency, are deemed a part of the *res gestæ*, and binding upon the principal.(e) But the admission of the agent cannot always be assimilated to the admission of the principal. The party's own admission is binding upon him under all circumstances; but the declarations or admissions of his agent bind him only when they are made during the continuance of the agency, in regard to the transaction then pending, *et dum fervet opus*.(f)

6. A demand of goods pawned to the principal made of his agent, and a tender to him of the money due on them, will, upon the refusal of the agent, if usually entrusted to deliver up such property, amount to evidence of conversion by his employer.(g)

1337.—3. The principal is civilly liable to third persons for the torts, misfeasance, negligence or omission of duty of his agent, in the course of his employment, although the principal did not authorize, or justify, or participate in, or indeed know of such misconduct, or even if he forbade or disapproved of

(a) Smith on Merc. Law, 69; Abbott on Ship. 90—99.

(b) Paley on Ag. by Lloyd, 293.

(c) Anon. 1 Esp. 349.

(d) Story on Ag. § 140.

(e) Story on Ag. §§ 134, 137; 1 Greenl. Ev. § 113.

(f) Doe v. Hawkins, 2 Ad. & Ell. N. S. 212; Sauniere v. Wode, 3 Harrison's R. 299.

(g) Bac. Ab. Master and Servant, K; Alexander v. Southey, 5 B. & Ald. 247; and see 2 Saund. 47 e, f, g; 2 Salk. 441.

it; the rule *respondet superior* being applicable in these cases. And this rule is founded in justice and equity. The principal holds out his agent as competent and fit to be trusted, and by his conduct warrants his fidelity and good behavior in all matters relating to the agency.(a) A civil action may, therefore, be sustained against the principal for negligence in driving a carriage,(b) or navigating steamboats or ships,(c) or for negligently packing goods to be carried by the master as a common carrier.(d)

The principal is liable not only for such acts of his immediate agent, but also for the acts of his sub-agent, employed in the course of his business.(e)

The liability of the principal to third persons may arise, where the injury committed is not within the scope of the ordinary business of the principal, when it has been committed by previous command, or it has afterward been assented to, adopted, or ratified by him. For example, if the principal should direct his agent to commit a trespass, or to make a conversion of the property of a third person, or he should subsequently ratify or adopt the act, when done for

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(a) Story on Ag. § 452. See *Lane v. Cotton*, 12 Mod. 490; *Paley on Ag. by Lloyd*, 294, 301; *Bac. Ab. Master, &c. K*; *Hern v. Nichols*, 1 Salk. 289. Mr. Hammond is of a different opinion; he says, "the ground of the principal's liability cannot be that he has selected an agent more or less unworthy, and placed him in a situation which enables him to become an instrument of mischief to his neighbors, because this would hold him responsible, not alone for acts done by the other in his capacity *quatenus* agent, but even for a wilful default." *Ham. N. P.* 81. And Blackstone assigns this reason, that "the wrong done by the servant is looked upon in law as the wrong of the master himself; and it is a standing maxim that no man shall be allowed to make any advantage of his own wrong." 1 Bl. Com. 432. But this cannot be the case where the master has forbidden the act, and yet he is as liable as when he has coöperated in the wrong.

(b) *Weyland v. Elkins*, Holt's N. P. C. 227; S. C. 1 Stark. N. P. C. 272; 6 T. R. 661.

(c) 8 T. R. 188; *Paley on Ag. by Lloyd*, 297.

(d) 1 Wils. 282.

(e) *Bush v. Steinman*, 1 Bos. & Pul. 409.

his benefit, he would be liable as an original trespasser.(a)

The liability of the principal for the torts, misfeasance, and negligence of his agent, is confined to such of these acts as occur in the course of his agency; for it is not just nor reasonable that he should be held responsible for acts beyond the agency, unless he has expressly authorized them, or adopted them afterward for his own use and benefit; as, for example, if a servant, while driving his master's carriage, should wilfully or maliciously run against another and do an injury, or run down a person on the road, or, coming down from his box, commit a battery upon another, the principal would not be responsible.(b)

#### SECTION 5.—OF THE RIGHTS OF THE AGENT.

1338. An agent's right may be divided into those against his principal, and those against third persons.

##### § 1.—Of the agent's rights against his principal.

1339.—1. An agent is entitled to receive from the principal a just compensation for his services, when faithfully performed, in execution of a lawful agency, unless such services are entirely gratuitous, or the agreement between the parties repels such a claim; this compensation, usually called a commission, is regulated either by particular agreement, or by the usage of trade, or the presumed intention of the parties.(c) Besides the ordinary commissions, there are sometimes allowed an extraordinary compensation, either by usage, or the positive agreement of the par-

(a) 4 Co. Inst. 317; Com. Dig. Trespass, C 1; *Sands v. Child*, 3 Lev. 352; *Jones v. Hart*, 1 Ld. Raym. 738; *Britton v. Cole*, 1 Salk. 408.

(b) *Smith on Mer. Law*, 69; *M'Manus v. Crickett*, 1 East, 106.

(c) *Bower v. Jones*, 8 Bing. 65; *Bradford v. Kimberly*, 3 John. Ch. 431; *Welsh v. Duser*, 3 Binn. 329; *Gregory v. Mark*, 3 Hill, N. Y. 380; *Tavebaugh v. Reed*, 5 Monr. 179; *Miller v. Livingston*, 1 Caines, 349.



ties; such as the commission called a commission *del credere*, which is an extra compensation paid to a factor or commission merchant, in consideration of his undertaking to become responsible for the solvency of the buyer, and the prompt payment of the purchase money for goods of the principal which he has sold.(a)

In general commissions are not due until all the services are performed, though to this rule there are exceptions;(b) and gross negligence, gross misconduct, or gross unskilfulness, is a forfeiture of commissions;(c) and the right to commissions will also be gone if there has been fraud in the transaction of the business of the agency, or its object has been illegal.(d)

1340.—2. The agent is also entitled to be reimbursed all his just advances, expenses and disbursements, made in the course of the agency, on account of, and for the benefit of the principal; and also to be paid interest upon such advances, whenever from the nature of the business, or the usages of trade, or the particular agreement of the parties, it may be fairly presumed to have been stipulated for, or due to the agent.(e)

1341.—3. The agent is not only entitled to be reimbursed all moneys advanced by him, with the interest, but he is also to be recompensed for any loss he may have sustained, without any fault of his own, while engaged lawfully in the performance of the business of the agency;(f) as where an agent, in consequence of a deception practiced upon him by his principal, and in pursuance of orders, innocently

(a) Paley on Ag. by Lloyd, 40, 41, 100.

(b) See *Hamond v. Holiday*, 1 C. & P. 384; *Broad v. Thomas*, 7 Bing. 99; *Read v. Rann*, 10 B. & Cr. 438.

(c) Paley on Ag. by Lloyd, 104, 105.

(d) Story on Ag. § 330, 333, 334.

(e) 2 *Liverm. on Ag.* 11—23; Story on Ag. § 335; Story on Bailm. § 196; Smith on Merc. Law, 56; *Meech v. Smith*, 7 Wend. 315; *Delaware Ins. Co. v. Delaunie*, 3 Binn. 295; *Carlton v. Bragg*, 15 East, 223.

(f) *D'Arcy v. Lyle*, 5 Binn. 441.

makes a false representation of the quality of the goods of the principal, and, on that account, is compelled to pay damages to a purchaser, he will be entitled to a full remuneration from his principal.(a)

Besides the personal remedies which an agent has to enforce his claims against his principal, for his commissions and advancements, he has a lien upon the personal property of his principal in his hands.

In its most extensive signification, the term *lien* includes every case in which real or personal property is charged with the payment of a debt or duty; every such charge being denominated a lien on the property. In a more confined sense, it is the right of detaining the property of another until some claim be satisfied. As the nature of a lien has been considered elsewhere, a further examination here is not requisite.

§ 2.—Of the agent's rights against third persons.

1342. The rights of agents against third persons arise, first, on contracts made between them and such third persons; and, secondly, in consequence of torts or injuries committed by the latter.

*Art. 1.—Of rights arising on contracts.*

1343.—1. When a contract is in writing, and made expressly with the agent, and it imports to be a contract personally with him, although he may be known to act as agent, he will be entitled to recover; as, for example, when a promissory note is given to the agent as such, for the benefit of his principal, and the promise is to pay the money to the agent *eo nomine*.(b)

1344.—2. When the agent is the only known or ostensible principal, and therefore is, in contemplation

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(a) *Southern v. How*, Bridgman's R. 126; 2 Moll. 330.

(b) *Story*, Ag. § 393.

of law, the real contracting party. If an agent sell goods of his principal in his own name, and as if he were the owner, he is entitled to sue the buyer for the price in his own name, although the principal may also sue.<sup>(a)</sup> And on the other hand, if he buys, he may enforce the contract by action.

1345.—3. When, by the usages of trade, the agent is authorized to act as owner, or as a principal contracting party, although his character as agent is known, he may enforce his contracts by action. For example, an auctioneer who sells goods for others, may maintain an action for the price, because he has a possession, coupled with an interest, in the goods; and it is a general rule, that whenever an agent, though known as such, has a special property in the subject matter of the contract, and not a bare custody, or where he has acquired an interest and has a lien upon it, he may sue upon the contract. But this right to bring an action by agents is subordinate to the right of the principal, who may, unless in particular cases, where the agent has a lien, or some other vested right, bring a suit himself, and suspend or extinguish the right of the agent.<sup>(b)</sup>

*Art. 2.—Of the agent's rights arising from torts or injuries to him.*

1346.—1. An agent may maintain an action of trespass or trover against third persons for any torts or injuries to the goods which he holds in his possession as agent.<sup>(c)</sup>

1347.—2. When an agent has been induced by the fraud of a third person to sell or buy goods for his

(a) *Beebee v. Robert*, 12 Wend. 413; *Bickerton v. Burrell*, 5 Maule & Selw. 382.

(b) See 1 *Liverm. on Ag.* 226; 3 *Chit. Com. Law*, 201; *Paley on Ag.* by *Lloyd*, 362; *Morris v. Cleasby*, 1 Maule & Selw. 576; *Coppin v. Walker*, 7 Taunt. 237; *Walter v. Ross*, 2 Wash. C. C. 283.

(c) *Paley, Ag.* by *Lloyd*, 363; *Smith, Merc. Law*, 67; *Story on Ag.* § 414; *Story on Bailm.* §§ 93, 152.

principal, and he has sustained a loss, he may maintain an action against such third person for such wrongful act, deceit or fraud.(a)

#### SECTION 6.—OF THE LIABILITY OF THE AGENT.

1348. Agents are liable to their principals and to third persons.

##### § 1.—Of the agent's liability to his principal.

1349.—1. The agent is bound to obey the instructions of his principal, and a voluntary violation of them, by exceeding his authority, by misconduct, by negligence or omission, or by the performance of any act for which the principal sustains a loss, will render the agent liable for the consequences, however fair his motives may have been, or however pure his intentions.(b) Whenever the orders are positive, the agent must either refuse to act, or he is bound to a strict observance of them.(c) But the agent is excusable for disobeying instructions when he acts under an overwhelming necessity, or is prevented from acting by a like calamity; or when urged by an unexpected or unforeseen emergency, to which his instructions did not or could not apply; or if they did apply, that he was compelled to act as he did in order to prevent a greater loss, or the absolute ruin of his principal;(d) as if goods are in a perishable condition, they may be sold contrary to instructions; or if they are accidentally injured, they may be sold to prevent further loss; or if in imminent danger of being captured in one port, they may be removed to another.(e) In the absence

(a) Story on Ag. § 415.

(b) *Manella v. Barry*, 3 Cranch, 415, 439; *Walker v. Smith*, 1 Wash. C. C. 152; *Rundle v. Moore*, 3 John. Cas. 36.

(c) *Kingston v. Kincaid*, 1 Wash. C. C. 454, 457.

(d) 3 Ohit. on Com. and Man. 218; *Dusar v. Perit*, 4 Binn. 361.

(e) See *Catlin v. Bell*, 3 Camp. 183.

of instructions, he is bound to conform to the usages of trade, and he is liable for nothing more.(a)

But this rule binding the agent to obey the instructions of his principal, is subject to be changed by the equities of the former against the latter; for when an agent, a factor for example, has received goods for sale at a limited price, and has made advances, he may, however, unless the advances are returned to him after demand, sell them below the limit at a fair price to reimburse himself.(b)

1350.—2. A want of sufficient skill, and a neglect to employ adequate diligence for the accomplishment of the objects of the agency, will render the agent liable to the principal for the consequences.(c) But it is to be remarked, he is only liable for the loss occasioned by his negligence, for if no loss has occurred in consequence of it, he will not be liable, although he may have been negligent.(d)

1351.—3. The agent is required to keep his principal informed as to the business of the agency, and to advise him, in reasonable time, of the sales he has made, and of such other facts and circumstances, as may enable him to take measures for his security; and in case of his neglect, the agent will be responsible for all the loss he may have occasioned.(e)

1352.—4. We have seen(f) that an agent is bound to account with his principal in relation to the business

(a) Geyer v. Decker, 1 Yeates, 486; Evans v. Potter, 2 Gallis, 13.

(b) Parker v. Brancker, 22 Pick. 40, 45.

(c) Redfield v. Davis, 6 Conn. 439, 442; Lawler v. Keaquick, 1 John. Cas. 174; Story, Ag. § 183; Story, Bailm. § 23, 455; 1 Liverm. Ag. 331 to 341.

(d) Folsom v. Mussey, 1 Fairf. 297. To make the agent liable, there must be both a wrong and damage, for *damnum absque injuria*, and *injuria absque damno*, are equally objections to a recovery.

(e) Duval v. Burbridge, 4 W. & S. 305; S. C. 6 W. & S. 529; Brown v. Arrott, 6 W. & S. 402; Austil v. Crawford, 7 Ala. 336; Forrestier v. Boardman, 1 Story, 44.

(f) Ante, sec. 6, § 1, of this chapter.

of the agency, so that it will not be requisite further to discuss the subject.(a)

1353.—5. The above are the duties which every agent is bound to fulfil; there are others which arise from contracts in particular cases. For example, an agent is liable for the solvency of all persons to whom he has sold goods, and for which he has charged a *del credere* commission, for by this he becomes a guarantor that the buyer shall pay for the goods at the time stipulated.

§ 2.—Of the agent's liability to third persons.

1354. This liability of an agent to third persons arises either from his contracts, or from his torts or injuries.

*Art. 1.—Of the agent's liability on his contracts with third persons.*

1355.—1. It is evident that when a person undertakes to do business for another as his agent, that he thereby assumes to be invested with that character, which, if true, would bind the principal; but if such assumption is not founded in truth, then the supposed principal would not be liable. In this case the law holds the agent responsible personally; and when he is invested with authority, and he exceeds the power given to him, he is liable for the difference.(b)

1356.—2. An agent becomes responsible as a principal, when he does not disclose his agency, because in that case the credit is given to him personally.(c) And the rule is the same, although it is known that the agent is acting for others who are unknown, as, when an auctioneer sells goods, without

(a) See *Clark v. Moody*, 17 Mass. 145, 153.

(b) *Story*, Ag. § 166; *Co. Litt.* 258 a; *Com. Dig.* Attorney, C 15; *Deming v. Bullitt*, 1 Blackf. 241; *Hampton v. Speekenagle*, 9 S. & R. 212; *Meech v. Smith*, 7 Wend. 315; *Clark v. Foster*, 8 Verm. 98; *Sinclair v. Jackson*, 8 Cowen, 543; *Ballou v. Talbot*, 16 Mass. 461.

(c) *Owen v. Gooch*, 2 Esp. 567; *Ex parte Hartop*, 12 Ves. 352.

disclosing his principal, he will be liable to the purchaser on the contract.(a)

1357.—3. A foreign factor is always liable upon the contracts he enters into,(b) unless there be a special agreement to the contrary.

1358.—4. An agent is liable upon the contract when, from the form of it, it appears he intended to bind himself.(c) And he is equally liable when he makes a contract as agent, and there is no other responsible principal to whom resort can be had; as, if a man sign a note as "guardian of A B," an infant; in that case neither the infant nor his property will be liable on the note, and the agent alone will be responsible.(d)

1359.—5. If, in the character of agent, a person receive money for his principal, and afterward it appears that such money was paid to him in mistake, he holds it after notice of the mistake, not for the use of the principal, who is not entitled to it, but of the person who paid it to him; and if, after such notice, he pays it to the principal, he will be responsible in an action to the person who paid it to him; for as it might have been recovered from the principal, after notice, it was a wrong payment by the agent. But if, in consequence of the receipt of the money, there had been any change in relation to his principal, unfavorable to himself, the agent is ordinarily not liable.(e)

*Art. 2.—Of the agent's liability for his torts to third persons.*

1360. A distinction as to the liability of an agent has been made between acts of non-feasance and acts of malfeasance; between neglects or omissions, and active or positive wrongs.

(a) *Hanson v. Roberdeau*, Peake's R. 120.

(b) *Paley*, Ag. by Lloyd, 248, 273.

(c) *Story*, Ag. § 156, 159.

(d) *Thatcher v. Dinsmore*, 5 Mass. 299; *Forster v. Fuller*, 6 Mass. 58.

(e) *Farge v. Kneeland*, 7 Cowen, 456.

1. *Of acts of non-feasance.*

1361. For acts of non-feasance or omissions of duty, the agent's liability is confined to his principal; there being no privity between him and third persons, but a privity existing between him and his principal: the rule in these cases is, *respondeat superior*.(a) Thus if a servant of a common carrier should negligently lose a parcel of goods entrusted to him, the principal, and not the servant, is responsible to the owner; or if an under sheriff is guilty of negligence in executing a writ, an action lies against the high sheriff, and not against the deputy personally for his negligence.

2. *Of acts of misfeasance.*

1362. Contrary to the rule in cases of non-feasance, an agent is liable to a third person for his acts of misfeasance, whether such acts were authorized by the principal or not, for the principal has no right to confer an authority on him to commit a tort upon the rights or property of a third person.(b) Thus if the owner of a horse deliver him to a smith to shoe, and he deliver him to another smith, who lames him, the owner may have an action on the case against the latter, though he did not deliver the horse to him;(c) but if the servant of the smith should by unskilfulness lame him, no action will lie against the servant, but against his employer,(d) unless the servant had maliciously done the injury, when an action might be maintained against him for the tort.(e)

1363. When the principal is a wrong doer, the agent who participates in his acts becomes a wrong

(a) *Lane v. Cotton*, 12 Mod. 488; 1 Hare & Wall. Sel. Dec. 467.

(b) *Paley, Ag. by Lloyd*, 398; *State v. Matthis*, 1 Hill, S. C. 37; *Owings v. Hull*, 9 Pet. 607.

(c) *Roll. Ab.* 90.

(d) 1 *Bl. Com.* 430.

(e) *Story on Bailm.* § 402, 409; *Story on Ag.* § 310.



doer also, and as such is liable for the consequence ; thus, if an auctioneer should be employed to sell goods at auction which had been seized as the property of the defendant in an execution, when in fact they belonged to another person ; here both the sheriff and the auctioneer would be liable to an action for the trespass.(a)

SECTION 7.—OF THE DISSOLUTION OF THE CONTRACT OF AGENCY.

1364. The dissolution of the agency is the act by which the powers given to the agent are ended. This may take place in two ways : 1, by the act of the parties or of one of them ; 2, by operation of law.

§ 1.—Of dissolution by act of the parties.

1365. This dissolution may take place by the revocation of the principal or by the renunciation of the agent.

*Art. 1.—Of the revocation of authority.*

1366. A *revocation* is the act by which a person having authority, calls back or annuls a power which had been bestowed upon another. The revocation of an agency is the act by which the principal declares it at an end. Let us consider, 1, when a revocation may be made ; 2, when it takes effect ; 3, the modes of revocation ; 4, limits to the right of revocation.

1. *When a revocation may be made.*

1367. In general the principal has a right to revoke an authority at his pleasure, for as the authority was created by his own will, it can subsist only while that will operates, or is presumed to be the same ; when,

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(a) *Freebrother v. Analey*, 1 Campb. 343.

therefore, the principal declares that he no longer wills that the agent should act, but revokes the authority given, the power of the agent is at an end.

But this revocation must be made before the agent has commenced the business of the agency, or, if made after, it must be subject to all the lawful acts of the agent under the power. A distinction has been made, where the authority has been partly executed by the agent, between those cases where the authority admitted of severance, and those which did not. If the authority admitted of severance, then the revocation would be good as to the part unexecuted, but not as to that which was already executed. If, on the contrary, the authority was not thus severable, and, in consequence of the revocation, damage would happen to the agent on account of the execution of the authority *pro tanto*, then the principal would not be allowed to revoke the unexecuted part, without, at least, fully indemnifying the agent.<sup>(a)</sup>

The power of a substitute, depending upon the authority of the agent, is of course at an end, the moment that the authority of the agent ceases.

## 2. When the revocation takes effect.

1368. The revocation takes effect as to the agent when it is made known to him, and as to third persons when it is made known to them. As between the principal and himself, the agent has no further power the moment the revocation is made known to him, and if, afterward, he should do any act by which the principal might be prejudiced, the agent would be answerable for all the consequences; but a third person, knowing that an agency did exist, has a right to presume its continuance, and the principal will be

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(a) Story, Ag. § 466; 2 Story on Eq. Jur. § 1041 to 1047; Dig. 50, 17, 75; 1 Domat, b. 1, t. 16, § 3, art. 9; Poth. du Mandat, n. 121.

bound by the agent's acts until such third person shall be notified of the revocation; thus, if a clerk has been employed to sign or indorse bills, and he is discharged by the principal, if the discharge is not known to persons dealing with him, bills subsequently signed, indorsed, or accepted by him, will bind the principal, he having his remedy against the clerk.(a) And a payment made to an agent after the revocation of the authority, unknown to the debtor, will be good.(b)

### 3. The modes of revocation.

1369. The revocation may be express or implied.

1. An express revocation may be by a direct and formal declaration, publicly made known, or by an informal writing, or by parol.

2. A revocation may be implied from circumstances. It is not always easy to say what circumstances amount to a revocation; an example or two will show the nature of those which have that effect: when the principal having appointed one agent afterward appoints another to do the same business, it will be presumed that the agency of the first is at an end;(c) *eum, qui dedit diversis temporibus procuratores duos, posteriorem dando priorem prohibuisse videri.*(d) This, of course, must be understood of cases where the rights and powers of the agents are incompatible. Again, if a principal should entrust another to collect a debt for him, and, for that purpose, deliver to him a promissory note to be delivered to the debtor on payment of the money, and, afterward, the principal should take back the note, that would be an implied revocation of the authority of the agent.

(a) 3 Chitt. on Com. and Man. 197.

(b) Poth. Ob. n. 509.

(c) Morgan v. Stell, 5 Binn. 305; Copeland v. Merc. Ins. Co., 6 Pick. 198.

(d) Dig. 3, 3, 31, 2; Poth. Mandat, n. 114, 115.

*4. Of the limits of the power of revocation.*

1370. Although the general rule is that the principal may revoke the authority of the agent at pleasure, yet there are some limits to this power.

1. When the principal has agreed that the authority should not be revoked, and the agent has an interest in its execution, the principal cannot revoke it; but, in this case, there must be such an agreement, and the agent must have such an interest, for unless these circumstances concur, the revocation may be made.

2. When the authority is coupled with an interest, unless there be an express agreement that it shall be revocable, it cannot be revoked, for that would be depriving the agent of a vested right.(a)

*Art. 2.—Of the renunciation of the agent.*

1371. The agency may be determined by the *renunciation* of the agent, that is, by surrendering the authority which has been given to him. It may be before any part of the authority has been executed, or when it has been in part executed. When the agency is purely voluntary and gratuitous, the principal is not entitled to any damages for its non-execution; but if it was in part executed, and then renounced, by which the principal has sustained damages, the agent might be held responsible. And when the agency is founded on a valuable consideration, if the renunciation of the agent causes any loss to the principal, he will be held responsible, whether the authority be in part executed or not.(b)

In all cases, whenever the agent renounces his agency, he is required to give notice to his principal; and a failure to do so will render him amenable for

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(a) Hunt v. Rousmaniere, 2 Mason, 244; 1 Pet. R. 1.

(b) Story on Bailm. § 436; Jones on Bailm. 101; 3 Bl. Com. 157.

the losses his neglect may occasion, if the omission should be deemed fraudulent.

§ 2.—Of the dissolution of the agency by operation of law.

1372. The agency is dissolved by operation of law in various ways: 1, by the efflux of time; 2, by the occurrence of events, by which it was limited; 3, by the change of the state or condition of one of the parties; 4, by the death of either party; 5, by the extinction of the subject matter of the agency, or of the principal's power over it; 6, by its complete execution.

*Art. 1.—Dissolution of the agency by the efflux of time.*

1373. It is evident that when the agency is created for a period of time, that it ceases as soon as the time has elapsed; as if it were created for one year, after that time the agent would have no power.

*Art. 2.—Of the dissolution upon the happening of some event.*

1374. When the agency is created until some future event shall happen, it becomes extinct upon its happening; as if one about to leave home appoint a person to attend to his business in his absence, the power ceases the moment his return becomes known to the agent; indeed, whether there were a limitation in the power of attorney or not, the return of the principal might, perhaps, be considered as a revocation.(a)

*Art. 3.—Of the dissolution by a change in the condition of the parties.*

1375. This incapacity may be in the principal, or in the agent.

1. *Of the incapacity of the principal.*

1376. As a general rule, the authority of the agent

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(a) Poth. Mandat, n. 119.

being derived from the principal, cannot rise higher than its source; if the principal ceases to have authority, that of the agent is extinguished; for example, if a feme sole should constitute another her agent by power of attorney, and afterward she should marry, the marriage would, *ipso facto*, amount to a revocation; because a married woman cannot, without her husband, constitute an agent. Again, if the principal should become insane, as he could not do any act while in that state, the agent could not, in the same time, act in his name; but in such case the insanity ought, perhaps, to be established by an inquisition.(a)

As bankruptcy and insolvency, as soon as assignees are appointed, deprive the principal of his property, it follows that the authority of the agent is revoked by such an event, unless in those cases where the rights of the bankrupt do not pass by the assignment,(b) and perhaps some other cases where equity would enforce the act to be done.(c)

But it must be remembered that this revocation by incapacity of the principal does not affect those cases where the agent's authority is coupled with an interest, for, in that case, he has an equitable right in the subject matter of the agency, of which he cannot be deprived by the acts or misfortune of the principal.

## 2. Of the incapacity of the agent.

1377. An agent may act as such although he might not be able to act for himself, and therefore his change of condition, in some cases at least, does not deprive him of the ability to act for others; for example, a married woman cannot act for herself, but, unless prohibited by her husband, may act as the agent of

(a) See *Hunt v. Rousmaniere*, 8 Wheat. 174; 2 Liverm. Ag. 307; *Story on Bailm.* § 206.

(b) *Smith on Merc. Law*, 72.

(c) *Paley, Ag. by Lloyd*, 187; *Dixon v. Ewart*, 3 Meriv. 322.

another; her marriage after her appointment, would not, therefore, *per se*, disqualify her to act as an agent; and if her agency is coupled with an interest, it is irrevocable.(a)

Bankruptcy does not necessarily suspend or revoke the power of the bankrupt to act as agent for another.

Insanity, when established, necessarily annuls the agency.

*Art. 4.—Of dissolution by the death of either party.*

1378. This happens either by the death of the principal or of the agent.

*1. Of the death of the principal.*

1379. A mere naked power is revoked by the death of the principal, whether it be expressed to be irrevocable or not;(b) but when it is coupled with an interest, the death of the principal is no revocation. As a general rule it may be laid down that in the case of the death of the principal, the power of the agent ceases, whether such death were known or not, and that all the acts of the agent afterward are void, because the instant the constituent dies, the estate belongs to his personal representatives, or his heirs, or devisees, or creditors; and their rights cannot be divested or impaired by any act performed by the attorney afterward; the attorney being then a stranger to them, and having no control over their property;(c) and as an additional reason it is urged that the act is invalid, because it must be performed in the name of the principal, and then he had no existence.(d) But it has been held, that, under certain circumstances,

(a) Anon. Salk. 117; *Marder v. Lee*, 3 Burr. 1469.

(b) *Galt v. Galloway*, 4 Pet. 332.

(c) *Harper v. Little*, 2 Greenl. 14, 18; *Hunt v. Rousmaniere*, 8 Wheat. 201.

(d) Story on Ag. § 488.

the acts of an agent, performed *bona fide*, in ignorance of the principal's death, are binding.(a)

2. *Of the death of the agent.*

1380. The death of the agent of course puts an end to the agency, for it then becomes impossible for him to execute the power; and, as he was selected on account of his personal qualifications, it follows that the authority does not become vested in his personal representatives.

As a substitute is appointed by the agent, under a power of substitution, and as the agent is accountable to the principal for the acts of his substitute, it follows that the death of the agent extinguishes the authority of the substitute.(b) But a distinction has been made in this case between a substitute who acts for the agent, and a sub-agent who has been appointed by the agent, who is to act independently of the agent; as, where a power is given to an agent to transact the business of the agency, and an additional power is given to him, that if he will not act, then to appoint another who will; in that case the death of the agent will not revoke the appointment of the sub-agent.(c)

*Art. 5.—Of the extinction of the subject matter of the agency.*

1381. When the matter which is the subject of the agency is lost or destroyed, it is evident the agency is annulled. If I authorize you to sell my horse to another, and the horse dies, the agency is at an end; if I sell him myself, and you have knowledge of the fact, you cannot afterward sell him by my authority, because there is an implied revocation of the agency.

*Art. 6.—Of the dissolution by the complete execution of the power.*

1382. It is not required to say any thing more than

(a) *Cassaday v. McKensie*, 4 Watts & Serg. 282.

(b) *Poth. Mandat*, 105; 2 *Liverm. Ag.* 308.

(c) *Poth. Mandat*, n. 105; *Story on Bailm.* § 20; *Story on Ag.* § 490.



barely to state, that as soon as the agent has completed the business with which he was entrusted, his agency is *functus officio*; having received its natural termination, from thenceforth his authority ceases.

#### CHAPTER XL.—OF SURETYSHIP.

1383. *Suretyship* is an accessory agreement, by which a person binds or obligates himself for another already bound for the fulfilment, either in whole or in part, of such obligation, if the obligor or debtor does not fulfil it. Pothier defines suretyship to be a contract by which some one binds himself for an obligor, toward an obligee, to fulfil, in whole or in part, what the obligor is bound for, by acceding to his obligation. (a)

This chapter will be divided, by taking a view of, 1, the parties; 2, of the form of the contract; 3, of the extent and obligations of the surety; 4, of the extinction of the contract; 5, of the rights of the creditor against the principal; 6, of the rights of the creditor against the surety; 7, of the rights of the surety against the creditor; 8, of the rights of the surety against the principal; 9, of the rights of the sureties against each other.

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(a) The words of the original are, "le cautionnement est un contrat par lequel quelqu'un s'oblige pour le débiteur envers le créancier, à lui payer, en tout ou en partie, ce que ce débiteur lui doit, en accédant à son obligation." *Traité des Obligations*, n. 366. This definition has been pronounced deficient by Mr. Theobald, in his learned *Treatise on the Law of Principal and Surety*, p. 1, because Pothier uses the word *payer*, which Mr. Theobald translates *to pay*; but in the sense it is used, it signifies *to fulfil*, or *discharge*, in the same way that *solvere* is used in the Roman law, namely, *to untie*, *to unbind*. Mr. Theobald says that *débiteur* and *créancier* are susceptible of a corresponding obligation. These words signify rather obligor and obligee; *débiteur* is one who is bound to perform some engagement, and *créancier*, (the word used by Pothier, and not *crédeur*,) is one to whom a *créance* or claim is owing. This has been shown in a note to n. 1040.

## SECTION 1.—OF THE PARTIES.

1384. The person for whom another is bound is called the principal *debtor* or *obligor*; the person to whom he is bound is the *creditor* or *obligee*; and he who is so bound for another, is the *surety*.

## § 1.—Of the principal.

1385. The person undertaken for must be liable as well as the person making the promise, for otherwise the promise would be a principal and not a collateral agreement; and the promisor would be liable in the first instance; as, if one should become surety for a debt contracted by a slave, or a person found by inquisition to be *non compos mentis*, as the slave and the person *non compos mentis* would not be bound, there would be no principal, and consequently no contract of suretyship, and the person thus undertaking, if he knew of the incapacity of the supposed principal, would be considered as a principal.(a) Again, if a person having no authority from another, undertakes to contract a debt in his name, and then becomes surety for it, he will be considered as a principal.(b)

1386. When the surety undertakes for a particular individual, the engagement extends only to his acts, and if the principal take a partner the surety will not be bound for the acts of the firm; as where a banker employed A to transact business for him, and took a bond with surety for the faithful execution of the trust; and A took B as his partner, and the banker trusted A & B; on a suit for a breach of the condition, it was held that the banker was not entitled to recover.(c)

(a) *Burge on Sur.* 6; *Pitm. P. & S.* 13; *Poth. Obl. n.* 367; *Burchmyer v. Darnall*, 2 *Ld. Raym.* 1066; *Harris v. Huntback*, 1 *Burr.* 373.

(b) *Burrell v. Jones*, 3 *B. & Ald.* 47; *Thompson v. Bond*, 1 *Campb.* 4.

(c) *Bellairs v. Ellsworth*, 3 *Camp.* 52.

because the surety did not guarantee the acts of the firm.

For a similar reason, if the engagement of the surety is for more persons than one, he is considered liable for them jointly and collectively, and in case of the death of one, he is not responsible for the acts of the survivors.(a)

1387. Suretyship being only an accessory obligation to that of the debtor, it follows that if there be no principal debtor, who is legally bound, there can be no suretyship: *cum causa principalis non consistit, ne ea quidem quæ sequuntur locum habent.*(b)

§ 2.—Of the creditor.

1388. There must be a creditor to whom the promise is made; the debt may be created at the time when the surety is given, or before or afterward. It is not necessary that the obligation should have been contracted at the time the surety became bound, the surety may be for a debt already due, or for one to be thereafter created.

Whenever the creditor cannot enforce the payment of the debt or the fulfilment of the obligation against the principal, the surety cannot be made responsible.

The obligation for which the surety is given may be to pay a sum of money, or to perform some act, as the building of a house, or that another shall perform a certain service.

1389. Difficulties arise frequently in cases of mercantile guarantees particularly, as to whether the persons to whom a promise has been made by a surety are entitled to recover or not. When a guarantee is made as to the character for honesty of a clerk to one man, and he afterward takes a partner; or when the

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(a) *Simson v. Cooke*, J. B. Moore, 588; S. C. 1 Bing. 452.

(b) Dig. 50, 17, 178.

guarantee is made to a partnership, and afterward the number of members of the firm is either increased or diminished, it is evident that the liability of the surety is not the same after the change as it was before; in these cases the partnership, after the change, is not the same as before, and the engagement of the surety does not extend to the new firm.(a) And so if one were to become surety for refunding all advances that A & B, two partners, should make to C, and B died, after which advances were made by A to C, the surety would not be responsible.(b)

§ 3.—Of the surety.

1390. The contract of suretyship may in general be entered into by all persons who are *sui juris*, and capable of entering into other contracts. In Louisiana, a woman cannot become surety for any one except her husband,(c) and, if she be unmarried, it follows she cannot become surety for any one.(d) By the ancient civil law, a woman could not become surety for another, but Justinian, by his Novel 134, c. 8, permitted a woman to renounce her right to the protection which the law gave her, in the instrument by which she became a surety, and then she had full capacity to bind herself as surety for another.(e)

1391. How far partners are bound by the act of one of them, is a question of frequent occurrence. As a general rule the law seems to be this: if the act concerns the partnership trade, or business, it binds all, unless there be an express previous dissent; but if such act do not concern the partnership trade, or be

(a) Wright v. Russell, 3 Wils. 530; Myers v. Edge, 7 T. R. 254; Penoyer v. Watson, 16 John. 100.

(b) Strange v. Lee, 3 East, 484. See Weston v. Barton, 4 Taunt. 673; Russell v. Perkins, 1 Mason, 368.

(c) Beauregard v. Purnas, 1 Mart. R. 295.

(d) Lacroix v. Coquet, 5 N. S. 527.

(e) Poth. Ob. n. 388.

not in the usual course of trade, it is not binding on the rest but by their assent, express or implied. The acts in relation to becoming sureties for others appear to be ruled by this principle, although each case seems to have been decided upon its own circumstances.(a)

If the engagement of the surety be by bond or other instrument under seal, the strictest proof of the consent of the other partners will be required.

#### SECTION 2.—OF THE FORM OF THE CONTRACT OF SURETYSHIP.

1392. The contract may be in writing under seal, or not under seal, or it may be verbal, when not required to be in writing by the statute of frauds. It cannot be presumed; it ought to be express, and it must be restrained within the limits intended by the contract. When the contract must be in writing, under the statute of frauds, has been considered in another place.(b) But whatever may be its form in these respects, like every other contract, it requires the consent of the party to whom, as well as of the person by whom the promise is made. Hence if the instrument does not express an absolute engagement, but a proposal or offer to guarantee, the contract is not complete until the party to whom the proposal has been made has signified his acceptance of it. A distinction must be made between an *offer* to guarantee at a future time, and an *absolute present guarantee*. The former is not binding till accepted; the latter takes effect as soon as made. An example or two will explain the difference: "I guarantee the payment of any goods which A B delivers to C D," is a present guarantee, and the party to whom it is given may act on it without further communication.(c) On the other

(a) *Hope v. Cust*, cited in 1 East, R. 53.

(b) *Ante*, n. 918.

(c) *Oxley v. Young*, 2 H. Bl. 613; *Stadt v. Lill*, 9 East, 348; *Hargrave v. Smece*, 6 Bing. 244.

hand, "I have no objection to guarantee you against any loss for giving them this credit;" (a) "I have no objection to be answerable as far as £50. For any reference apply to Messrs. B. & Co. of this place," have been held as mere proposals to guarantee, and that the party to whom they were severally made, ought to have given notice to the maker of his acceptance. (b)

SECTION 3.—OF THE EXTENT OF THE OBLIGATION OF THE SURETY.

1393. The contract of the surety cannot be of greater extent, nor more onerous, either in its amount, or in the time or manner or place of performance, than the engagement of the principal. (c) But it may be less onerous both in its amount and in the time, place, and manner of its performance, than that of the principal debtor. Still, the remedy for enforcing it may be more extensive against the surety than that against the principal; for example, the performance of his obligation by the surety may be secured by mortgage, judgment, or a penalty, while that of the principal may rest on the personal security of the debtor.

To understand the extent of the obligation of the surety, the terms employed in entering into the engagement must be observed.

When the surety agrees to become responsible for a certain sum, he is liable only for that; as where he agreed to be responsible to the amount of one hundred dollars, he cannot be made to pay one hundred dollars and the interest; or if he should become surety that my tenant will pay his rent, he is not liable for the breach of other covenants in the lease.

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(a) *McIver v. Richardson*, 1 M. & S. 557.

(b) *Mozley v. Tinckler*, Cr. M. & Ross, 692.

(c) When, therefore, one becomes surety on a void contract, he is not bound, although he believed it to be valid. *Evans v. Huey*, 1 Bay, 13. See *Kyle v. Bostick*, 10 Ala. 589.

But on the contrary, if the surety becomes bound in general and indefinite terms, he makes himself liable for all the engagements of the principal, resulting from the nature of the contract; for example, when the surety becomes bound to me that my tenant will perform his covenants in the lease existing between us, he is bound not only to see that my tenant pays his rent, but also that he will perform all the covenants he has obligated himself to perform toward me; and if the rent be in arrears, and the principal be liable for interest, he will also be responsible.

When one becomes surety for the fidelity of another in an office of limited duration, or the appointment to which is for a limited period only, he is not obliged beyond that period; as where one appointed a deputy for six months, and took the obligation of a surety that the deputy should, during all the time he continued deputy, faithfully execute the duties of his office; and during the six months he faithfully so performed his duties, but afterward, having been continued for a further time, he committed a breach of duty, the surety was held discharged.(a)

Upon a similar principle, when one becomes guarantor for the payment of goods to be sold to another, if the guarantee is limited as to its duration, the surety will be bound only for the goods sold during the limited period; or if it be limited as to amount, then only for the goods sold within the limit: thus, where A addressed a letter of credit to B, in these words, "If C wishes to take goods of you on credit, we are willing to lend our names as security for any amount he may wish," and C purchased goods which he afterward paid for, and subsequently purchased other goods which were not paid for, it was held that the surety was not liable for the last goods.(b)

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(a) *Arlington v. Merrick*, 2 Saund. 403.

(b) *Rogers v. Warner*, 8 John. 119.

1394. But when the guarantor undertakes, by the terms of his engagement, to be liable for any debts which may be contracted at any time, this is called a *continuing guarantee*, and the surety is responsible for any debt contracted by the principal, within the limits of the engagement as to amount; as where the surety wrote to the creditor, "I consider myself bound to you for any debt he may contract for his business as a jeweler, not exceeding one hundred pounds, after this date." The principal bought goods from time to time for more than a year afterward, during which time they had several settlements, and he paid the creditor more than one hundred pounds: this was held to be a continuing guarantee, and the surety was responsible for that sum which the principal owed the creditor. (a)

SECTION 4.—OF THE EXTINCTION OF THE CONTRACT OF SURETYSHIP.

1395. The extinction or dissolution of the contract of suretyship takes place, 1, by the terms of the contract itself; 2, by the acts to which both the principal and creditor are alone parties; 3, by the acts of the creditor and surety; 4, by the acts or omission of the creditor; 5, by the acts of the surety; 6, by mistake; 7, by fraud; 8, by operation of law.

§ 1.—Of the discharge of suretyship by the terms of the contract itself.

1396. When by his contract the surety limits the period of time for which he is willing to be responsible, it is clear he cannot be held for a longer period; as when he engages that an officer who is elected annually shall faithfully perform his duty during his continuance in office, his obligation does not extend

(a) *Marle v. Wells*, 2 Campb. 413. See *Cramer v. Higginson*, 1 Mason, 323; *Pitm. Pr. and Surety*, 41; *Theob. on P. & S.* 66.



for the performance of his duties by the same officer, who may be elected for a second year; (a) or where a clerk was appointed for *six months* and gave security for the faithful performance of his duties as such, the surety was held not to be responsible for acts done after the six months expired. (b)

§ 2.—Of the extinction of suretyship by the acts of the principal and creditor alone.

1397. The acts of the creditor and of the principal, performed without the consent of the surety, which discharge the latter, are, 1, compromise; 2, respite or extension of time; 3, novation, delegation, or alteration of the contract; 4, accord and satisfaction; 5, surrendering of collaterals by the creditor to the principal.

*Art. 1.—Effect of compromise.*

1398. A *compromise* is an agreement between two or more persons, who amicably settle their differences on such terms as they can agree upon. When the compromise is made between the creditor and the principal debtor, the latter is wholly released from his engagement, and, as the surety's obligation is merely accessory, it follows that he is also discharged, for otherwise this result would follow, that if the surety paid the debt, he might sue the principal debtor, who had actually been released by the creditor, and the latter would obtain circuitously, what he could not directly.

But this rule must be understood as applying only to discharge the obligation of the surety as such; for if, previous to the composition or release of the principal, the surety has so far changed the nature of his engagement as to become a principal himself, he will

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(a) *Bartlett v. Attorney General*, Park. 277.

(b) *Arlington v. Merrick*, 2 Saund. 403, 411.

not be discharged by the compromise or the release; as where previously to the time when a release was given by the creditor, the surety paid a part of the debt and gave a security for the remainder, and by that means made it his individual debt; it was held that although the creditor released the principal afterward, the surety was bound for that part of the debt which remained unpaid.(a)

*Art. 2.—Of the effect of respite or an extension of time.*

1399. *Respite*, in the sense it is here employed, is a delay, forbearance, or continuation of time. Any agreement for a sufficient consideration by which a creditor gives his debtor a delay or time of paying his debt, beyond that contained in the original agreement, has the effect of discharging all the obligations of persons who are mere sureties, unless such respite has been given with the consent of such sureties; because this is such a change of the contract as to suspend the right of action against the principal, and consequently against the surety, and it is a rule that a right once suspended is gone for ever; it may be revived, it is true, but that must be with the consent of all the parties bound by it.(b) In order to have this effect, the creditor must deprive himself of the right to sue, at least for a time; for a mere delay in suing without fraud or any agreement with the principal, is not such respite or giving time as will discharge the surety.(c)

(a) *Hall v. Huchons*, 3 Myl. & K. 426.

(b) *Roll. Ab. Extinguishment*, (L), (M). See *United States v. Hallegas*, 3 Wash. C. C. 70; *Chippenger v. Creps*, 2 Watts, 45; *Bank v. Woodward*, 5 N. H. Rep. 99; *Bank v. Hoge*, 6 Ham. 17; *Kennebec Bank v. Tuckerman*, 5 Greenl. 130.

(c) *King v. Baldwin*, 2 John. Ch. 529; *Cope v. Smith*, 8 S. & R. 113; *Wright v. Sampson*, 6 Ves. 734. See *Sailey v. Ellmore*, 2 Paige, 497; *Baird v. Rice*, 1 Call, 18; *Ellis v. Bibb*, 2 Stew. 63; *Hunt v. United States*, 1 Gallis. 32; *Hunt v. Bridgham*, 2 Pick. 581; *Naylor v. Moody*, 3 Blackf. 93; *Miller v. Stem*, 2 Penn. St. R. 286; *Parnell v. Price*, 3 Rich. 121; *Waters v. Simpson*, 2 Gilm. 570; *U. States v. Hodge*, 6 How. U. S. 279.

Upon a similar principle that giving time to the principal discharges the surety, it has been decided in Pennsylvania that the creditor is bound to sue the principal, when required by the surety, and the debt is due, when a proper notice is given to the creditor, that unless he sues, the surety will consider himself discharged.(a) But the reason of this is, that the courts in Pennsylvania administer equity through the medium of legal proceedings; for there, by the established usage of the courts, a defendant may protect himself by an equitable defence.(b) And courts of equity will grant relief in such cases.(c)

*Art. 3.—Of novation, delegation or alteration of the contract.*

1400. A novation, we have seen, is a substitution of a new debt for an old one.(d) When the creditor and the principal agree to substitute a new for an old debt, it is evident that the surety for the payment of the old debt is totally discharged. But in such case the old debt must be totally extinguished, for if the debtor or principal give his note for a debt due on book account, for which debt the surety was bound, it will not operate as a release of the old debt, unless it was so intended.(e)

In the same way, if the principal procure another

(a) 8 S. & R. 116; *Gardner v. Ferree*, 15 S. & R. 29, 30; *Erie Bank v. Gibson*, 1 Watts, 143. But if the indulgence is merely permissive, no eventual loss will discharge the surety. *United States v. McCormick*, 3 Penn. 437. See *Johnson v. Thompson*, 4 Watts, 446; *Geddes v. Hawk*, 10 S. & R. 33; *Lichtenhaler v. Thomson*, 13 S. & R. 157; *Wilson v. Glover*, 3 Penn. St. R. 404. In Alabama, the law is the same, 9 Porter, 409.

(b) 8 S. & R. 115; *Eddowes v. Nixel*, 4 Dall. 133; 15 S. & R. 29. See *Rees v. Berrington*, 2 Ves. Jr. 540; *Nesbit v. Smith*, 2 Bro. C. C. 579, 582; *King v. Baldwin*, 2 John. Ch. R. 554; S. C. 17 John. 334; *Wright v. Simpson*, 6 Ves. Jr. 734.

(c) *Pitm. on P. & S.* 125; *Nesbitt v. Smith*, 2 Bro. C. C. 579; *Gilb. Eq. R.* 67; *Antrobus v. Davidson*, 3 Meriv. 569.

(d) *Ante*, n. 800.

(e) 15 S. & R. 162; 2 Wash. C. C. 191, 321; *Sneed's Ex'r v. White*, 3 J. J. Marsh, 527; *Brown v. Wright*, 7 Monro, 398.

to become debtor in his place, the surety is released. And if the principal and the creditor agree to change the contract in any material part, more onerous to the surety, the latter is discharged from his obligation, for he cannot be held bound for a contract to which he was no party; and the altered contract is not the same for which he became security.(a) Indeed, such change releases the surety, when made without his consent, though he sustains no injury by it, or even receives a benefit.(b)

*Art. 4.—Of accord and satisfaction.*

1401. When the principal is bound by his engagement to pay a sum of money, or to perform some covenant or promise, and he gives security, and afterward, without the consent of the surety, the creditor receives another thing in the place of what is owing to him, this is said to be an accord and satisfaction.(c) This has the effect of releasing the surety.

*Art. 5.—Effect of the surrender of collaterals by the creditor to the principal.*

1402. The surety is entitled to all the advantages and benefit which the creditor can derive from property put into his hands by the principal as a collateral security, for on the payment of the debt by himself to the creditor, he may claim the application of such collateral property to reimburse him; if, therefore, the creditor surrender such property without the consent of the surety, he loses his claim against the

(a) Burge on Sur. 214; *Bonsor v. Cox*, 6 Beav. 110; *Clarke v. Henty*, 3 Yo. & C. 187; *Eyre v. Bartrop*, 3 Madd. 221.

(b) *Miller v. Stewart*, 9 Wheat. 680; *United States v. Tillotson*, Paine, 305; *Commissioners v. Ross*, 3 Binn. 520; *U. States v. Hillegas*, 3 Wash. C. C. 70.

(c) Ante, n. 805. In Louisiana, this is called *dation en paiement*. Civ. Code, art. 2625.

latter, to the extent of the value of the property given up.(a)

The fact that the surety did not know of the existence of such securities, will not affect his rights, for he is in all cases entitled to the benefit arising from them;(b) where, therefore, a debt was secured by two promissory notes, given by two sureties, each for half of the amount of the debt, and the principal debtor also gave the creditor a warrant of attorney, upon which judgment was entered, and the goods of the debtor were seized under an execution issued on the judgment, and the creditor afterward withdrew the execution, it was held that the sureties were discharged *pro tanto*.(c)

§ 3.—Of the extinction of the contract of suretyship by the acts of the principal alone.

1403. The acts of the principal alone which discharge the surety are, 1, performance of covenants or payment of the debt; 2, tender; 3, set off.

*Art. 1.—Of performance of covenants and payment of debts.*

1404.—1. It is clear that when the principal pays the debt, the surety is discharged from all obligations, because he became surety simply that the principal should do what he has done. The only difficulty in the case is to know whether the payment has actually been made. When the debtor or principal owes several debts, one of them with, and the other without security, and then pays money to the creditor, it is in his power to say to which account the payment

(a) *Baker v. Briggs*, 8 Pick. 122; *Commonwealth v. Miller*, 8 S. & R. 452. See *McLean v. Lafayette Bank*, 3 McLean, 587.

(b) *Mayhew v. Crickett*, 2 Swanst. 185; *Law v. East Ind. Co.*, 4 Ves. 824.

(c) 2 Swanst. 185.

shall be applied.(a) The payment thus made binds the surety, and he cannot control the principal to make such application as he chooses.(b) But the right of the creditor or debtor to make the appropriation exists only when the payment is voluntary; it is only from the presumed assent of the debtor that the creditor can make the appropriation, and neither the debtor nor the creditor can make the application of the proceeds of a levy.(c) To release the surety, the payment must be such as discharges the debtor from his debt; for a payment made in counterfeit notes would not be valid.(d)

1405.—2. When the engagement is for the performance of a covenant, the surety is discharged the moment it has been performed by the principal. But if the obligation was to be discharged by the delivery of an article, say a horse, and the principal should deliver to the covenantee the horse of another, although, at the time, he thought himself the owner, this would not discharge the surety; nor, according to Pothier, would the surety be discharged, if the thing delivered belonged to the covenantor or principal, if at the time he had no right to pass the title to it; as, if a person *non compos mentis*, should deliver a horse of which he was the owner to the covenantee, after an inquisition found against him.(e)

*Art. 2.—Of the effect of a tender to release the surety.*

1406. As to the form and effect of a tender between the creditor and debtor, the reader is referred to another part of this work.(f) When the tender has

(a) Ante, n. 831.

(b) *Saunders v. Taylor*, 9 B. & Cr. 35; *Pinnell's Case*, 5 Co. 117; *Collins v. Gwynne*, 9 Bing. 544; *Gwynne v. Burnell*, 2 Bing. N. C. 7.

(c) *Blackstone Bank v. Hill*, 10 Pick. 132.

(d) Ante, n. 821.

(e) *Poth. Ob.* n. 496.

(f) Ante, n. 1115.

been properly made by the principal, at the time, or after the debt became due, the principal has performed all that the surety undertook he should do, and the latter is consequently discharged, for the creditor cannot, by a captious objection to receive what is due to him, continue the responsibility of the surety. But a tender not made according to law, would not have this beneficial operation toward the surety.

*Art. 3.—Of the effect of a set off by the principal.*

1407. The term *set off* has already been explained. By the common law this right did not exist, for, according to that system, mutual debts were distinct and inextinguishable except by payment or release.<sup>(a)</sup> This differed from the *compensation* of the civil law, the principles of which are laid down with much precision in the Civil Code of Louisiana. By that code, “when two persons are indebted to each other, there takes place between them a compensation that extinguishes both the debts,” in the manner and cases therein expressed. It “takes place of course, by the mere operation of law, even unknown to the debtors; the two debts are reciprocally extinguished as soon as they exist simultaneously, to the amount of their respective sums.”<sup>(b)</sup>

1408. But a right to set off does not, either under the statute 22 Geo. II., c. 22, or those which have been enacted generally in the United States, extinguish the respective debts to the extent of the amount of the smaller. The only right the defendant in an action upon a contract has, when there have been mutual dealings between the parties, is to plead the set off. There exist, however, provisions in perhaps all the states where the principal of compensation has been

<sup>(a)</sup> 1 Rawle, 293; Babb. on Set Off. 1.

<sup>(b)</sup> Art. 2203, 2204; Commercial Bank v. Mayor, et al. 11 Lo. Rep.; Morton v. Graham, 11 Lo. Rep. 449; Burge on Surety, B. 2, c. 6.

adopted in certain cases. Under the late bankrupt law of the United States, the debts between a bankrupt and his debtors were to be settled on the principle of compensation, and only the balance could be recovered. Under the intestate laws of Pennsylvania, and perhaps other states, when the deceased was indebted at the time of his death, and had claims against his creditor, the difference only can be recovered.

1409. Whenever, in a proceeding by the creditor, the principal could, *in equity*, claim a right of set off, the surety is entitled to the same benefit, because the proceeding against the surety is in effect a proceeding against the principal, who must indemnify the surety: thus, where a bill of exchange was drawn by D upon A, which A accepted for the accommodation of D, and D discounted the bill with his bankers, who became bankrupts before its maturity, having in their hands at the time of their bankruptcy the bill of exchange, and also a cash balance of the drawer, the bill of exchange was ordered to be given up in reduction of the cash balance, leaving the drawer at liberty to prove for the difference; for if an action had been brought against D, he would have had the benefit of a set off, and he ought to have the same benefit, if the action were against A, who being merely D's surety, would have to be repaid by D.(a)

§ 4.—Of the extinction of the contract of suretyship by the acts or omission of the creditor.

1410.—1. The surety may be released by the acts of the creditor, as when he executes a formal release to the principal, the obligation of the surety is discharged. And a covenant not to sue, given to a sole debtor, has the same effect as a release, and may be

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(a) *Ex parte Hippines*, 2 Glyn. & Ja. 93. See *Collins v. Jones*, 10 B. & Cr. 777; *Ex parte Stephens*, 11 Ves. 24; *Ex parte Hanson*, 12 Ves. 316.



pleaded in bar of any action for the enforcement of the original obligation. But a distinction must be made between a release and a covenant not to sue, when given to one of several joint debtors, so far as regards the rights of the surety. A formal release, under seal, to one of several joint debtors, discharges the whole of them, and consequently relieves the surety from all liability, but the release in such case must be formal and under seal. But a covenant not to sue given to one of several joint debtors, cannot be pleaded in bar to an action against the whole.(a) 2. A surety will be discharged, also, if the creditor for whose benefit the principal was bound to perform or make certain improvements on his land, prevents such principal from making them.(b)

1411.—3. When the contract of the principal, for which the surety undertook, was subject to a condition which has not been performed; or when the contract of suretyship, as between the creditor and the surety, is subject to a condition, the surety is discharged, if that condition be not performed; as, if the surety engages to guarantee the amount of goods to be supplied to the principal, provided eighteen months' credit be given to him, and the creditor give him only twelve months' credit, and, after the expiration of six months more, he sue the surety on his guarantee, he will not be allowed to recover.(c)

1412.—4. The creditor is required to act with regard to the surety so as to relieve him from the liability which he has incurred, by receiving the debt from the principal, whenever it is in his power; this is upon the plainest rule of justice; if, therefore, the

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(a) *Lacy v. Kynaston*, 12 Mod. 548; S. C. 1 Ld. Raym. 688; *Hutton v. Eyre*, 6 Taunt. 288; *Morley v. Friar*, 6 Bing. 547.

(b) *Trustees of Section Sixteen v. Miller*, 3 Ham. 261.

(c) *Bacon v. Chesney*, 1 Stark. 129. See *Glynn v. Hertel*, 8 Taunt. 208; *Holl v. Hadley*, 5 Bing. 54; *Ex parte Ashwell*, 2 Deac. & Chit. 281; *Campbell v. French*, 6 T. R. 200.

principal dies, leaving an estate, and the creditor neglect to demand payment out of the same, when he might have obtained it, the surety is discharged, *pro tanto*.(a)

§ 5.—Of the extinction of suretyship by the acts of the surety.

1413. The surety is discharged from the obligation by the payment of the debt, or performance of the covenants, made by himself to the creditor or covenantee. But such payment does not discharge the principal; on the contrary, the surety is generally subrogated into all the rights of the creditor.(b) By *subrogation* is meant the act of putting, by a transfer, a person in the place of another, or a thing in the place of another thing. It is the substitution of a new for an old creditor, and the succession to his rights which is called subrogation; *transfusio unius creditoris in alium*.(c) And, indeed, this right of substitution extends, not only against the principal, but against co-sureties; thus one of three joint sureties, who paid the debt of their common principal, may be subrogated to the rights of the creditor in the judgment paid by him, to enable him to recover contribution from the other two.(d) But the party must be actually subrogated and not rely merely upon his right of subrogation.(e)

The rule of substitution applies only to cases where the plaintiff has been fully paid, for while something remains unpaid the creditor has a right to retain the security.(f)

1414. By the Roman law, the principles of which,

(a) *Ramsey v. Westmoreland Bank*, 2 Pennsylv. 203. But see *Hooks v. The Bank at Mobile*, 8 Ala. 580.

(b) *Sterling v. Forrester*, 3 Bligh. R. 590, 591.

(c) *Miller v. Ord*, 2 Binn. 382; *Neimcewicz v. Gahn*, 3 Paige, 614.

(d) *Croft v. Moore*, 9 Watts, 451; 1 Paige, 185; 7 John. Ch. R. 211.

(e) *Rittenhouse v. Levering*, 6 Watts & Serg. 190; *Bank of Pennsylvania v. Potius*, 10 Watts, 148.

(f) *Kyser v. Kyser*, 6 Watts, 221; 10 Watts, 152.

in this respect, have been adopted in Louisiana,<sup>(a)</sup> the sureties are liable for the whole debt due to the creditor; but this liability is subject to three exceptions.

1. The creditor is generally bound to proceed by the process of *discussion*, that is, a proceeding by which the property of the principal debtor is made liable before resort can be had to the sureties; this is called the *benefit of discussion*.

2. Although each surety is bound for the whole debt, yet when one of several sureties alone is sued, he has a right to have the debt apportioned among all the solvent sureties on the same obligation, so that he shall be compelled to pay his own share only; this is called the *benefit of division*.

3. But if the surety should pay the whole debt, without insisting upon the benefit of division, then he has no recourse against his co-sureties, unless upon payment he procured himself to be substituted to the original by *cession*, that is, an assignment by the creditor; in which case he might insist upon payment of a proper proportion from each of his co-sureties;<sup>(b)</sup> and in case of the insolvency of either of the sureties, the share of the insolvent is apportioned among the solvent sureties *pro rata*.<sup>(c)</sup>

§ 6.—Of the extinction of the contract of suretyship by fraud.

1415. Fraud by the creditor, or by the debtor or principal, with the knowledge or assent of the creditor, will discharge the surety from his liability; for it is not presumed he would have entered into it in the absence of such fraud. If the original obligation by the debtor can be avoided by fraud, the surety will

(a) Civil Code of Lo., art. 3014 to 3020.

(b) Domat, 3, 4, 1; Poth. Ob. n. 407, n. 519; Poth. Pand. lib. 46, t. 1, art. 2, n. 45 to 51; Burge on Sur. 329, 343, 348; 5 Toull. p. 544; 7 Toull. p. 93.

(c) Domat, 3, 4, 2.

also be discharged; it being a just maxim that fraud vitiates every thing. The principles to be drawn from the cases seems to be this, "that if, with the knowledge or assent of the creditor, any material part of the transaction between the creditor and his debtor is misrepresented to the surety, the representation being such, that but for the same having taken place, either the suretyship would not have been entered into at all, or, being entered into, the extent of the liability of the surety might be thereby increased, the security given is voidable on the ground of fraud."<sup>(a)</sup>

But the fraud which will avoid the suretyship may be, not only against the surety, it may operate on others. A security given by a debtor in embarrassed circumstances to one of his creditors, in order to induce him to come in with other creditors into a composition, is void; and even when a surety is a party to this agreement, it will be void as to him upon grounds of public policy, though he be *particeps criminis*.

§ 7.—Of the extinction of suretyship by the operation of law.

*Art. 1.—By lapse of time.*

1416. The act of limitation is a complete bar to a recovery against a surety after the expiration of the proper time. But a question has been raised whether the principal could, by an acknowledgment of the debt, so far revive it as to render the surety responsible. It seems to be a rule, that when a debt is severed, the acknowledgment of one of the debtors cannot revive it against the other; as where a joint debt is severed by the death of one of the joint debtors, it has been held nothing can be done by the personal representatives of the other, to take the debt out of the statute as against the survivor.<sup>(b)</sup> The debts of the principal

(a) Per Tindall, C. J., *Stone v. Compton*, 5 Bing. N. C. 142.

(b) *Slater v. Lawson*, 1 B. & Ad. 396. See *Atkins v. Tredgold*, 2 B. & C. 25; S. C. 3 Dowl. & Ry. 200.

and surety being severed, it would seem by analogy that the acknowledgment of the principal ought not to revive the liability of the surety; but it has been decided that it would have that effect, unless there had been collusion between the creditor and principal.<sup>(a)</sup>

*Art. 2.—By confusion.*

1417. When the duty to pay and the right to receive is in the same person, there is said to be a *confusion of right*; when, therefore, a man gives a note to a woman, with surety, and he afterward marries her, the surety is discharged, because the husband, as such, is entitled to the money due upon the note; unless, indeed, by the contract, the man intended to make provision for his future wife, in which case, a court of equity preserves the rights of the wife, though there is no remedy at law to enforce them.

1418. By the common law, the appointment of a debtor, executor of the creditor, discharged the debt, and, of course, the surety was no longer responsible. But in the United States, generally, the executor is now charged with the amount of the debt as assets.

*Art. 3.—By bankruptcy and insolvency.*

1419. The bankruptcy or insolvency of the debtor does, under some systems of jurisprudence, discharge the obligation of the principal debtor and release him from all liability for provable debts; but even under those systems the original obligation generally remains in force against the surety. And when one of several co-sureties is discharged under those laws, as a bankrupt, the obligation still subsists against the others.

Bankrupt laws discharge the obligation of the debtor, but insolvent laws have no other effect than to relieve

(a) Angell on Lim. 272, 1st ed. See *Burleigh v. Scott*, 2 Man. & Ry. 93; S. C. 8 B. & C. 36; *Burge on Sur.* 284.

his person from arrest, the original debt being still subsisting against him.(a)

*Art. 4.—By death.*

1420. When the contract of the principal is altogether personal, as to accompany another on a journey, to serve him as a journeyman or apprentice, or to instruct an apprentice, and the contractor dies, the surety is fully discharged, except for violations or breaches of the contract before the death of the covenantor. But the contracts of a deceased person are not in general affected by his death, his executor or administrator is bound to fulfil them, and his surety is equally responsible as if he were living.

The death of a defendant before the bail is fixed discharges the bail; but when he dies after the return of a *ca. sa.*, the bail is fixed.(b)

SECTION 5.—OF THE RIGHTS OF THE CREDITOR AGAINST THE PRINCIPAL.

1421. Though the release of the principal will be a release of the surety, the converse of the proposition is not the law; the release of the surety does not release the principal, and he is at all times liable as if the surety had not been released. But when the debt is a joint one, and the creditor releases one of the principal debtors, he has no remedy against the other.(c) To have this effect, however, the release must be express and not a mere constructive release, as a covenant not to sue one of the obligors, for such covenant cannot be pleaded in bar to an action against two joint debtors, though it may be, to prevent circuity of action, where there is a sole debtor.

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(a) Ingrah. on Insolv. *passim*.

(b) Tidd's Pr. 243; 5 Binn. 323; 12 Wheat. 604; 4 Pick. 120; 6 T. R. 284; 4 N. H. Rep. 29; 3 McCord, 49.

(c) In New York, by statute, a creditor may release one of several joint debtors and retain his rights against the others.

**SECTION 6.—OF THE RIGHTS OF THE CREDITOR AGAINST THE SURETY.**

1422. The object of the contract of suretyship is the greater security of the creditor. As the surety is liable only for the default of the principal, that default must have taken place, and the creditor must have a right to sue the principal, before he can sue the surety. Until the time of payment, or for the performance of the act has arrived, the principal cannot be sued, and the surety cannot be made liable; if, therefore, the creditor is required to perform a condition precedent, he cannot demand the performance by either. An example will illustrate this. If the surety engage that his principal shall, from time to time, *when required so to do by the creditor*, duly account for moneys received by him; and that he shall pay any balance that may be due from him, the creditor, before he can compel the surety to pay any thing, must proceed to take an account; for the surety is not bound beyond the terms of his contract, and he is entitled to a strict performance of those terms.<sup>(a)</sup> And if the surety promise to pay the debt of the principal upon the failure of the latter, *the same being previously requested of him*, a previous request must be made by the creditor before suit.<sup>(b)</sup>

Upon the same principle, the holder of a promissory note must make a demand of payment of the maker, and give notice of non-payment to the indorser, before suit brought.

But when once the right of action has accrued, the creditor is not bound to sue the principal in the first instance, but may proceed against the surety, unless

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<sup>(a)</sup> *Elworthy v. Maunder*, 2 Moo. & P. 482; S. C. 5 Bing. 295; *Antrobus v. Davidson*, 3 Meriv. 569.

<sup>(b)</sup> *Alcock v. Browfield*, Noy, R. 95.

the surety became such on condition that the principal should first be sued.(a)

As to the extent of the surety's liability, it is regulated by the contract itself, he cannot be made responsible beyond his engagement; and where he becomes bound by a bond, he can never be made liable beyond the penalty.(b)

The rights of the creditor against the surety, do not merely extend to his personal liability, the creditor is also entitled to the benefit of all the pledges or securities given to, or in the hands of a surety of the debtor for his indemnity, whether the surety is damaged or not, as it is a trust created for the better security of the debt and attaches to it.(c)

#### SECTION 7.—OF THE RIGHTS OF THE SURETY AGAINST THE CREDITOR.

1423. When treating of the extinction of the suretyship by the acts of the surety, we considered the right of the surety to be subrogated or substituted in the place of the principal, so that but little remains to be said here.

There are some cases where equity will grant relief to a surety against a creditor, who has a right to a fund arising out of the property of the principal, and compel him to resort to such fund, but there is no relief at law in such case.(d)

#### SECTION 8.—OF THE RIGHTS OF THE SURETY AGAINST THE PRINCIPAL.

1424. These rights may be considered with regard,

(a) *Gaddis v. Hawk*, 1 Watts, 280. See *Reynolds v. Rogers*, 5 Ham. 169.

(b) *Briggs v. Cramer*, 2 South. 498; *Clark v. Bush*, 3 Cowen, 151; *Fairlie v. Lawson*, 5 Cowen, 424; *United States v. Boyd*, 15 Pet. 187; *Raney v. Baron*, 1 Branch, 327.

(c) *Ohio Life Insurance Co. v. Ledyard*, 8 Ala. 866; *Roberts v. Colvin*, 3 Gratt. 358.

(d) *Folliott v. Ogden*, 1 H. Bl. 124.



1, to the time when they accrue; 2, to the amount which may be recovered; 3, to the form of the action for their recovery.

§ 1.—When the rights of the surety against the principal accrue.

1425. These rights may accrue, 1, after payment has been made by the surety; or, 2, before such payment.

*Art. 1.—Of the rights of the surety after payment by him.*

1426. When the surety has paid the debt of the principal after the time he agreed to pay it, his right to sue the principal is vested; but he must be careful not to pay before the debt is due, for a payment before that time would give no right to the surety, at least, until the debt became due.

It is immaterial whether the surety has paid the debt in consequence of a judgment against him, or voluntarily after he became liable; for, in both cases, he has obtained the liberation of the principal from the creditor, and consequently the latter ought to reimburse him what he has expended in so doing.<sup>(a)</sup> And it is immaterial also whether the surety has made an actual payment, or that which is equivalent to it, as by set off, novation, or compromise; by either of these means he may extinguish the claim of the creditor against the principal, and entitle himself to recover what he has so paid, or secured to be paid or set off, to extinguish the obligation of the principal debtor.<sup>(b)</sup>

The obligation of the principal to pay the surety is a personal obligation, and he may be sued by the surety, after the latter has paid, notwithstanding the surety may have received a security to indemnify him, for he is not exclusively confined in his remedy

<sup>(a)</sup> Voet, lib. 48, t. 1, n. 33.

<sup>(b)</sup> Exall v. Partridge, 1 T. R. 308; Broughton's Case, 5 Co. 24; Hodgson v. Shaw, 3 Myl. & K. 183; Pearson v. Parker, 3 N. H. Rep. 366.

to look to such security for his indemnity, unless it was agreed that the security should be so confined.(a)

*Art. 2.—Of the rights of the surety before payment by him.*

1427. But not only has the surety the right to sue the principal at law after having paid the debt, or be relieved by him from all liability upon it, he is entitled to further protection; for, before he has so paid the debt, he may apply to a court of equity for relief when his liability has attached by reason of the default of the party for whom he became responsible, although he may not have been sued by the creditor. When a person is security on a contract, there is a joint contract that the principal shall indemnify the surety, and, the ground on which the court acts is, that when the money is due, the equity arises; it being unreasonable that a surety should be forever at the mercy of the creditor, in respect of an engagement which ought to be performed by the principal.(b)

1428. The principal is liable to an action, before the surety has paid the money, when he has given a bond to the creditor payable at a day named, though given by way of indemnity, for, after the day, the condition is broken.(c) But when the bond given is a bond of *indemnity*, not payable at a particular day, the surety must show that he has been damnified.(d)

§ 2.—Of the amount to be recovered by the surety against the principal.

1429. When the surety has been compelled to pay the debt due to the principal, he may recover the

(a) *Cornwall v. Gould*, 4 Pick. 444.

(b) *Ranlaugh v. Hayes*, 1 Eq. Ca. Ab. pl. 5; S. O. 1 Vern. 190; S. O. 2 Ch. Cas. 146; *Nisbett v. Smith*, 2 Bro. C. C. 579; *Hungerford v. Hungerford*, Gilb. Eq. R. 67.

(c) *Penny v. Foy*, 8 B. & Cr. 11; *Holmes v. Rhodes*, 1 B. & P. 638; *Toussaint v. Martinnant*, 2 T. R. 100; *Monnell v. Smith*, 5 Cowen, 441.

(d) *Challoner v. Walker*, 1 Burr, 574. See 8 B. & Cr. 11; *Ingalls v. Dennett*, 6 Greenl. 79.

amount he has paid, together with interest and costs. (a) And when he has voluntarily paid what was due, his right to recover is the same, but he cannot speculate upon his principal; where, therefore, he has compromised with the creditor, he can only recover what he has actually paid, and interest. (b)

Upon the same principle, if the creditor, from a personal regard to the surety, made a gratuitous remission of the debt, it was held by the Roman law, that the surety could not demand any thing from the principal debtor, who had profited by the remission, because it had cost the surety nothing. (c)

1430. But the surety has no right to be reimbursed when he has made a payment under an illegal engagement, to the illegality of which he was privy; (d) nor would he be entitled to recover from the principal, if, in consequence of his neglect in informing the principal that he had paid the debt, the latter should pay it a second time to the debtor; all he could ask would be to receive a transfer of the rights of the principal to recover what had been paid to the creditor by mistake. (e)

§ 3.—Of the form of action by surety against principal.

1431. When the surety has no written obligation from the principal, either that he will pay the debt or indemnify the surety, his only remedy at law, is by an action of *indebitatus assumpsit*; for in such case there is an implied promise by law on the part of the principal to reimburse the surety the money so paid by him for the principal; (f) but when the surety has

(a) *Wynn v. Brooke*, 5 Rawle, 106; *Burge on Sur.* 361.

(b) 5 Rawle, 106; *Butcher v. Churchill*, 14 Ves. 567; *Reed v. Norris*, 2 Myl. & Cr. 361.

(c) See Voet, 46, 1, 23; Dig. 17, 1, 12.

(d) *Bryant v. Christie*, 1 Stark. Cas. 329. But see *Ford v. Keith*, 1 Mass. 138; *Johnson v. Johnson*, 11 Mass. 359; *Hargraves v. Lewis*, 3 Kelly, 162.

(e) Voet, 46, 1, 33; Poth. Ob. Art. 1, § 3.

(f) *Toussaint v. Martinnant*, 2 T. R. 100.

taken from the principal any security upon which he may proceed for the recovery of the money paid by him, he must resort to the remedy adapted to the security which he has taken, and cannot maintain an action of *assumpsit*.

SECTION 9.—OF THE RIGHTS OF SURETIES AGAINST EACH OTHER.

1432. The rights of sureties against each other may be established in two ways: 1, by action at law; 2, by suit in equity.

§ 1.—By action at law for contribution.

1433. When two or more persons jointly owe a debt, and one is compelled to pay the whole of it, the others are bound to indemnify him for the payment of their shares; this indemnity is called a *contribution*.(a) This remedy the surety may enforce against his co-sureties, without suing the principal, or showing his inability to pay.(b)

The right of contribution exists between co-sureties, whether they are so by the same instrument or by separate instruments.(c) The sureties may, however, at the time of entering into the contract, so limit their liability, with regard to each other, that one shall be responsible for only a certain sum of money, and the right of contribution can then be enforced only to that extent.(d) And so likewise when the sureties are bound by different instruments, for equal portions of a debt due by the principal, and the suretyship of each is a separate and distinct transaction, there is no right

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(a) 1 Bibb, 562.

(b) Odlin v. Greenleaf, 3 N. H. Rep. 270.

(c) Mayhew v. Crickets, 2 Swanst. 185; Claythorne v. Swinburn, 14 Ves. 160.

(d) Pendlebury v. Walker, 4 You. & C. 424; Walsh v. Baillie, 10 John. 180.

of contribution between them.(a) A surety is no less entitled to this contribution, because, at the time he became surety, he was ignorant that he had a co-surety.

This right of contribution among sureties is founded, not in contract, but is the result of general equity on the ground of equality of burden and of benefit, upon the maxim, *qui sentit commodum, sentire debet et onus* : he who derives advantages ought to sustain the burden ; therefore, when three sureties are bound by different instruments for the *same principal* and the *same engagement*, they are bound to contribute.(b)

When the surety pays the whole debt, he is entitled to contribution from each of the others, if they are all solvent ; but if there are more than two, and one is insolvent, he who paid the debt is entitled to contribution from those who are able to pay ; for example, if there are three and one is insolvent, the surety who paid may recover from the other surety who is solvent one half of what he paid, and for the expense of suing out the writ against him when he has been sued, but he is not entitled to the expense of defending the action.(c) And when he has been reimbursed a part of his payment either by the debtor, a counter-security, or any other source, he must deduct the sum reimbursed, and he is entitled to contribution only for the balance.(d)

This obligation of the surety to contribute is one on which the law raises an *implied assumpsit* on his part to pay his share of the loss ; and, on this implied

(a) *Cowper v. Twynam*, 1 Turn. & Russ. 426 ; *McDonald v. Magruder*, 3 Pet. 470.

(b) *Deering v. Winchelsea*, 1 Cox, 318 ; 2 Bos. & Pull. 270.

(c) But at law the surety can recover only one share of the loss, the whole being divided into as many shares as there are sureties. *Peter v. Rich*, 1 Ch. R. 34 ; *Hole v. Harrison*, 1 Ch. Cas. 246 ; *Cowell v. Edwards*, 2 Bos. & Pull. 268 ; *Browne v. Lee*, 6 B. & C. 689. See *Hayes v. Ward*, 4 John. Ch. R. 133.

(d) *Ex parte Gifford*, 6 Ves. 805 ; *Bachelder v. Fisk*, 17 Mass. 464.

promise, an action of *assumpsit* may be maintained at law. (a) This jurisdiction is resorted to when the case is not complicated; but on account of the great difficulty of adjusting the rights of the parties when sureties are numerous, and different actions must be brought against the different sureties for their respective quotas, resort is frequently had to courts of equity for their more efficient aid.

§ 2.—Of proceedings in equity for contribution.

1434. In those states where courts of equity have the same powers that are inherent in a court of chancery in England, the remedy in equity is frequently more efficacious than that which is afforded in a court of law. By filing a bill in equity, the complainant can bring all the co-sureties before the court, and, by that means, a multiplicity of actions is prevented; and this proceeding will be indispensable when the surety requires a discovery of the persons who are his co-sureties, the instruments by which they became such, and the amount. This remedy is the only effectual means by which the quantum of contribution to be paid by each surety can be ascertained; (b) or where the sureties are each bound in distinct and several penalties; (c) or where one of the sureties has been obliged to pay, the second has become insolvent, and the third has been required to contribute rateably to the payment of the *whole debt*; because, as before observed, at law only one-third could be recovered from him. (d)

(a) *Bachelder v. Fisk*, 17 Mass. 464.

(b) *Birkley v. Presgrave*, 1 East, 220.

(c) *Collins v. Prosser*, 1 B. & C. 682.

(d) *Peter v. Rich*, 1 Ch. Rep. 34; *Hole v. Harrison*, 1 Ch. Cas. 246; *Browne v. Lee*, 6 B. & C. 689; *Cowell v. Edwards*, 2 B. & P. 268.

## CHAPTER XII.—OF PARTNERSHIP.

1435. Partnership, or copartnership, is an agreement between two or more competent persons for joining their money, goods, labor and skill, or either or all of them, for the purpose of advancing fair trade and of dividing the profits and losses arising from it, proportionably or otherwise, between or among them. (a) Sometimes the term partnership signifies a moral being composed of the reunion of all the partners. (b)

1436. A distinction must be observed between a partnership and a corporation; a partnership may be composed of any number of persons, by the simple agreement and consent of the parties; for all associations to transact business for the common benefit, with the common stock or capital, formed by the voluntary acts of the parties alone, are partnerships. A corporation cannot be formed by the voluntary act of the parties alone, but must be specially sanctioned by a special law, creating a body politic. In this case, although they have contributed to the general fund, and are entitled to the profits, the members are not partners. The corporation exists independently of the particular persons who compose it; and its property alone is responsible for its liabilities.

1437. A partnership is also to be distinguished from a tenancy in common, and from a joint tenancy.

Part owners of chattels differ essentially from partners. They are either joint owners, or tenants in common, each having an independent, although an undivided interest, in the property; and neither can

(a) Story on Partn. § 2; Wats. on Partn. 1; Gow. on Partn. 2; Poth. Pand. lib. 17, t. 2, in pr.; Colly. on Partn. 2; Montague on Partn. 1; Poth. De Société, art. prélim. n. 1; Domat, Civ. Law, B. 1, t. 8, art. prélim.; Code Civil, art. 1832; Civ. Code of Lo. art. 2772; 5 Duv. Dr. Civ. Fr. t. 9, c. 1, n. 17; 4 Pard. Dr. Com. n. 966; 2 Bell's Com. 611 5th ed.; Asso & Manuel, Inst. of Laws of Spain, B. 2, t. 15.

(b) 4 Pard. Dr. Com. n. 966.

dispose of, or transfer the whole property, without the consent of his companion ; but each can sell his own share or interest in it, and the purchaser will stand in the place and possess the rights of the seller ; whereas in a partnership one can dispose of the whole of the joint property, and if he should sell only one part, or his interest in it, the purchaser would take only the rights of the seller after a full settlement of the partnership debts.

1438. This chapter will be considered under six sections, which will treat of, 1, the essential character of a partnership ; 2, of the capital stock ; 3, of the different kinds of partnership ; 4, of the liabilities of partners to third persons ; 5, of the rights of partners against third persons ; 6, of the dissolution of the partnership.

SECTION 1.—OF THE ESSENTIAL CHARACTER OF A PARTNERSHIP.

1439. A great number of questions which may arise on this subject may be solved if we clearly understand, 1, how the agreement among the partners is formed ; 2, who are the partners ; 3, who are to administer the partnership property ; 4, the community of interest.

§ 1.—Of the agreement which constitutes a partnership.

1440. To constitute a partnership, there must be an agreement among the partners, and *an intent* to form such contract ; for there can be no partnership without such intention. This circumstance distinguishes this contract from numerous relations, which may arise between the parties from the mere operation of law, independent of contract ; for example, there may be a community of interest created by law between the parties, which is not a partnership.(a)

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(a) *Sayer v. Frick*, 7 W. & S. 383.



Joint tenants, or tenants in common of lands, or goods and chattels, under devises and bequests in last wills, or donees *inter vivos*, or distributees under the intestate laws, though having a common interest, are not partners. Every community of goods does not create a partnership, though in every partnership there is a community of interest; to give rise to such a relation, there must be an agreement that it shall exist. (a)

A partnership can commence only by the voluntary consent of the parties; so that when it is once formed, it remains the same until it is dissolved.

Being a contract, a partnership is liable to all the rules which require contracts to be made in good faith, and clear of fraud; that they be legal, and contain all the essential elements of a *lawful* agreement. If a partnership be formed for immoral or illegal purposes, or if it be in contravention of the positive law, or the public policy of the country, it will be considered void; as, if it be for illegal gaming, illegal insurances, or wagers, to carry on a contraband trade, or the slave trade, or to support a house of ill fame, or any such unlawful purpose, it will be a mere nullity. (b) The reason for this is clear; it is that a partnership cannot subsist for the purpose of doing unlawful things, as the partners cannot, in such case, unite or bind themselves to each other.

#### § 2.—Of the partners.

1441. Under this head will be considered who may be partners, and the several kinds of partners.

#### Art. 1.—Who may be partners.

1442. The persons who compose a partnership are

(a) Pard. n. 969; Poth. de Société, n. 2; Story, Partn. § 3.

(b) Gow on Partn. 7, 8; Wats. Partn. 35 to 46; 1 Bell's Com. 297, 5th ed.; 5 Duv. Dr. Civ. Fr. n. 24, 25; Dig. 27, 3, 1, 14; Dig. 17, 2, 53; Poth. Pand. 17, 2, 5, and 18.

severally called *partners*, and taken collectively they constitute a *partnership* or *firm*.

Every person *sui juris*, is competent to contract the relation of a partner; and even those whose contracts are only voidable, as in the case of infants, when the contract is of an uncertain nature, as to their benefit or prejudice.(a) Persons of unsound mind cannot enter into any contract, and consequently cannot become partners. Alien enemies are incapable of becoming partners, though there is no doubt alien friends may enter into the contract of partnership. A married woman is incapable by the common law of forming any contract whatever: there are, however, exceptions to this rule, even at common law. By the custom of London, and in some states, by virtue of statutes, a married woman may be authorized to carry on trade as a *feme sole*.(b) In the civil law, the relation of husband and wife is very different from that which these parties sustain toward each other by the common law. In the civil law the husband and wife are considered as two distinct persons, and may have separate estates, contracts, debts, and commit or suffer several injuries;(c) but still the wife cannot make binding contracts without the consent of her husband, and his authority, and the husband is the sole administrator of the property which they hold in community. When authorized by him to act as a sole trader, she may make herself liable for all the concerns of her mercantile transactions; and, it is supposed that by his authority, she may become a partner. The French law contains the same provisions, and the civil code of Louisiana coincides with it.(d)

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(a) Story on Eq. Jur. § 240; Story on Partn. § 7; Keane v. Boycott, 2 H. Bl. 511.

(b) See Colly. on Partn. 10; Burke v. Winckle, 2 S. & R. 189; 2 N. & McC. 242; 2 Bay, 162, 333.

(c) 1 Bl. Com. 444.

(d) Art. 121 to 131.

1443. When the partnership has once been formed, it must remain as it was made, as far as regards the partners, until it has been dissolved. It is of the essence of this contract that the partners should choose each other; no partner, therefore, can force his co-partner to receive another person into the firm; and the dissent of a single partner will exclude him; otherwise the exercise of such a right, by one, or a majority of the partners, would change the nature, terms and obligations of the original contract, and take away the *delectus personæ*, which is so essential to the constitution of a partnership. (a) But the articles of partnership may make a provision upon the subject, and, in that case, a third person may become a member of a firm, without any other consent of the partners; as where it is provided, that on the death of one of the partners, his executors shall carry on the business with the survivors. (b)

*Art. 2.—Of the kinds of partners.*

1444. Partners are considered as, 1, ostensible; 2, nominal; and 3, dormant.

*1. Of ostensible partners.*

1445. An actual, ostensible partner, is one who not only participates in the profits and contributes to the losses, but who *appears* and exhibits himself to the world, as a person connected with the partnership, and as forming a component member of the firm. He is clearly answerable for the debts and engagements of the partnership; his right to a share of the profits, or the permitted exhibition of his name as a partner, would be sufficient to render him responsible.

*2. Of nominal partners.*

1446. A nominal partner is one who has *not any*

(a) Colly. on Partn. 4; *Crawhay v. Maule*, 1 Swanst. 508.

(b) Colly. on Partn. 5; 2 Bell's Com. 634, 5th ed.

*actual interest* in the trade or its profits, but by *allowing his name to be used*, holds himself out to the world as having an apparent interest. He is liable as a partner to third persons, because of the false appearance he holds forth to the world in representing himself to be jointly concerned in interest with those with whom he is apparently associated. But a nominal partner is not responsible to the other partners for any losses which they may sustain.

### 3. Of dormant partners.

1447. A dormant partner is one who *participates in the profits* of the trade or business, but his name being concealed or suppressed from the firm, his interest is consequently not *apparent*. He is liable as a partner, because he receives and takes from the creditors a part of that fund which is the proper security to them for the satisfaction of their debts, and upon which they rely for payment.(a) Another reason assigned for subjecting a dormant partner to responsibility is, that if he were exempted, he would receive usurious interest for his capital, without its being attended with any risk. But a dormant partner is not liable for the debts of the firm, contracted after he has withdrawn from the partnership and has ceased to receive the profits of the business.(b)

1448. In order to constitute such a community of profits as to render a person who receives them liable as a partner, such a person must receive them as a *principal*; because if he be a mere agent, factor or servant, receiving in lieu of wages a sum proportioned to the profit gained by his employer, he will not be held responsible to third persons as a partner, for there is a distinction between receiving the profits as

(a) 16 John. 40. See *United States Bank v. Binney*, 5 Mason, 175; *Hoare v. Dawes*, 1 Dougl. 371.

(b) *Armstrong v. Hussey*, 12 S. & R. 315.

such, and a commission on the profits, and although this seems, at first sight, but a flimsy distinction, it appears to be a well settled rule of law.<sup>(a)</sup> The Roman law,<sup>(b)</sup> the French,<sup>(c)</sup> and the Scottish law,<sup>(d)</sup> recognize the same distinction.

*Art. 3.—Of the right of introducing new partners.*

1449. As a general rule, partners, strictly speaking, cannot sell their interest in the partnership so as to give the assignee the rights of a partner with the others; and an assignment of such interest, without the consent of the other partners, would operate a dissolution of the partnership, and the assignee would become a tenant in common of the partnership property with the other partners; if the others consented, it would, to all intent and purposes, be a substitution of the new for the old partnership.<sup>(e)</sup> In making such assignment or transfer, the partner can convey no more right than he possessed, his share in the partnership was subject to the payment of the partnership debts, his assignee will therefore take a transfer of his share with its liability for the payment of those debts.<sup>(f)</sup>

When a right is reserved to a partner, in the articles of partnership, to assign his rights to another, who shall be entitled to admission as a partner, he of course may do so, and the assignee will be a partner, but in that case the old partnership will be considered dissolved, and a new one substituted in its place. In

(a) *Miller v. Bartlett*, 15 S. & R. 157; *Dunham v. Rogers*, 1 Penn. St. R. 255, 262; *Colly. on Partn.* 17: *Cary on Partn.* 11; 1 Denio, 337; 20 Wend. 70; 3 M. Gr. & Sc. 32.

(b) Dig. 17, 2, 44; *Poth. Pand.* 17, 2, 4.

(c) 5 Duv. Dr. Civ. Fr. n. 48; 17 Duv. Dr. Fr. n. 332; *Poth. Du Contrat de Société*, n. 13.

(d) *Burt. Man. P. L.* 178; *Marquant v. N. Y. Man. Co.*, 17 John, 525; *Ketchum v. Clark*, 6 John. 144.

(e) *Story on Partn.* § 307.

(f) *Young v. Keghly*, 15 Ves. 567.

a case of this kind, the party having a right to assign, will be required to act in good faith, and not from caprice; an assignment to a person of no competent skill and honesty, would be an abuse, and not a fair exercise, of the right of assignment.(a)

1450. It will be remembered that part owners of a chattel may be simply tenants in common, without being partners, as if two persons buy a horse, a ship, or any other chattel. In this case each may sell his share or interest, and the purchaser will be a tenant in common with the other.

*Art. 4.—Of the distinction between the partners individually and the firm.*

1451. In the above definition it has been stated that a partnership is a moral being composed of a reunion of all the partners. As a partnership has a separate existence as a person, it may make engagements, and the partners, individually, are bound to fulfil them, only on its default, as sureties.(b)

A firm may make contracts of every kind which the individual partners might have entered into, and with all persons, even with the partners themselves in their individual capacity, and the latter are to be considered, among the partners, as third persons, though with regard to other creditors of the partnership they are not entitled to be paid until such creditors have been satisfied all their claims.(c) The reason of this is, that the creditor partner is bound with his associates to discharge all the debts of the partnership, and he will not be allowed to take any of its assets to pay himself to the exclusion of a stranger, a creditor of the firm. One of the partners may sell to the firm, of which he is a member, or lend to it,

(a) Colly. on Partn. 129; 1 Bell's Com. 620, 5th ed. But see Jeffreys v. Smith, 3 Russ. R. 158.

(b) 2 Bell's Com. B. 6, c. 1, n. 4, p. 619, 5th ed.

(c) Gow on Partn. c. 2, s. 3, p. 75, 3d ed.; Story on Partn. § 219.

subject to the above qualifications, as a third person might do.

The partnership acts always in the name of the firm, and, when so acting, it does not act for the individual partners separately; for example, an insurance made in the name of Peter and Company, on goods on board of the ship *America*, will not cover goods belonging to Peter alone, however general the words of the policy may be.

On the same principle, a contract made with a member of the firm, in his individual capacity, is not binding on the partnership, the creditor of the separate partner having a right only against the share of the debtor partner, which he may cause to be sold on execution.

Each partner is considered individually as distinct from the firm of which he is a member, and therefore, the accidents which may happen to one have no effect upon the other; a member of a firm may be insolvent and the firm solvent, or *vice versa*. Upon the same principle, when one or more individuals are members of several firms, the failure of one of them does not effect the others; for the creditors of one firm cannot claim the assets of the other, but can only make available, to the satisfaction of their claims, the share which the partner in both firms has in that which is solvent.

§ 3.—Of the management of the business of the partnership.

*Art. 1.—By a single partner.*

1452. By the very nature of things each one of the partners has an equal right to the management of the affairs of the firm, of which he cannot be deprived, unless he has willingly parted with it and confided it to others. The right to manage their affairs, may have been vested in some particular partners to the exclusion of the rest, in such case those only have this

right in whom it is vested.(a) But this rule is limited to the partners themselves, for with regard to third persons, who acquire rights by the acts of persons not so authorized, they are not affected by any such provisions, unless they know that such restriction has been made.(b)

In the absence of all stipulations expressed, each partner, *virtute officii*, possesses an equal and general power and authority on behalf of the firm to transfer, pledge, exchange, or apply, or otherwise dispose of the partnership property and effects, for any and all lawful purposes within the scope and objects of the partnership, and the usual course of its trade and business.(c) As a general assignment for the benefit of creditors is not within the usual course of its business, it may be well doubted whether such an assignment by one of the partners only is within his powers.(d)

1453. There are various restrictions to this general rule that partners, unless limited, have each the general authority to manage the estate; among them are the following:

1. The rights of each of the partners, to manage the concerns of the firm, are restricted to personal property, they do not extend to real estate held by the partnership, this, among others, for technical reasons, it being a rule of law that a partner cannot in general make any contract by deed which shall be binding on his copartners;(e) because the partner is

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(a) Story on Partn. § 101; 3 Kent, Com. 40, 4th ed.; Colly. on Partn. 259, 2d ed.; U. S. Bank v. Binney, 5 Mason, 176; S. C. 5 Pet. 529.

(b) Hawker v. Bourne, 8 Mass. & Welsb. 710.

(c) Story on Ag. § 37, 39, 124; Story on Partn. § 101; Colly. on Partn. 129; 2 Bell's Com. 615, 5th ed.

(d) Pierpont v. Graham, 4 Wash. C. C. 233; Dechart v. Filbert, 3 Watts & S. 454; Anderson v. Thompkins, 1 Brock. 456; Dickinson v. Legare, 1 Desaus. 537; Egberts v. Wood, 3 Paige, 517; Story on Partn. § 101, note, and the cases there cited.

(e) Wats. on Partn. 218; Gow on Partn. 83; Story on Partn. § 117.



considered as an agent of his copartners, and not being authorized by deed, he cannot bind his copartner by deed.(a) But this rule admits of some qualifications.(b)

2. A partner cannot in general submit a matter in dispute to arbitration, when it concerns or arises out of the partnership business, for various reasons: it is not within the scope of the business; the award may require partners to perform acts which they would not otherwise be required to perform; and, what is perhaps the soundest reason, it would take away the jurisdiction of the courts, without the consent of all the partners.(c)

3. Although one partner may procure advances of money to carry on the business of an established partnership; yet if the partnership is not established, one partner has no implied authority to bind the firm for advances, in its incipient state, to raise a capital for its use.(d)

*Art. 2.—By a majority of the partners.*

1454. When there are stipulations in the articles of partnership as to the persons who shall manage its concerns, the partners are bound by such agreement. In their absence the general rule is that each partner has an equal voice, and a majority, acting *bona fide*, have the right to manage the partnership concerns, and dispose of the partnership property, notwithstanding the dissent of the minority; but in every case when the minority have a right to give an opinion, they ought to be notified.(e)

(a) See *Hughes v. Ellison*, 5 Mis. 463; *Tapley v. Butterfield*, 1 Met. 515.

(b) 6 W. & Serg. 165.

(c) Com. Dig. Arbitrament, D 2; *Karthus v. Ferrer*, 1 Pet. 222; *Buchanan v. Curry*, 19 John. 137; *Steed v. Salt*, 3 Bing. 101; 2 Bell's Com. 615, 5th ed. In Pennsylvania, a partner may refer a partnership matter to arbitration by an unsealed instrument, *Taylor v. Corryell*, 12 S. & R. 243; and the same rule prevails in Kentucky, *Southard v. Steele*, 3 Munroe, 433.

(d) *Fisher v. Taylor*, 2 Hare, R. 218.

(e) *Const v. Harris*, Turn. & Russ. 496.

1455. In case of an equal division among partners, there is a suspension of the right of each to carry on the business, with regard to all persons having notice of the disagreement.<sup>(a)</sup> But it may happen that there are more than two propositions about which the partners are divided; for example, if of twelve partners, there should be five in favor of one measure, four in favor of another, and three in favor of the last; the first would have the plurality of the partners, but not the majority. In such case the question is, what is to be done? According to Pardessus,<sup>(b)</sup> no action can be had by either set of partners.

§ 4.—Of the community of interest.

1456. It is one of the essential characteristics of a partnership, that the property brought into it is put into community, by the joint consent of all the parties. When property is furnished by one as capital, the moment it becomes subject to the partnership it belongs to the whole of the partners, the profits which it yields are joint profits, and the loss must be borne by the firm; if it should be destroyed, it is the loss of the partnership, upon the principle which governs such cases, *res perit domino*. It is liable for the payment of the partnership debts, and these would have a preference, even over the creditors of the partner who furnished such property as capital.<sup>(c)</sup>

There must also be a community of interest in the profits of the business of the partnership, that is, a joint interest in those profits, for the very object of that contract is the common interest of the parties.<sup>(d)</sup> And if the agreement of the parties was that all the

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(a) *Willis v. Dyson*, 1 Stark. R. 164.

(b) 4 Droit Com. n. 980.

(c) *Holden's Adm. v. McMakin*, Pars. Sel. Cas. 270, 277. See Co. Litt. 182; Collyer on Partn. 65.

(d) Colly. on Partn. 11; Gow on Partn. 1; Poth. de Société, n. 12.

profits should belong to one only, the contract would not be a partnership, but a mandate, or an engagement of another nature.(a) In the absence of all agreement, the profits and losses are to be enjoyed or borne according to their respective proportions of the capital furnished. It is not necessary that they should have an equal share of the profits, it is sufficient if they share the net profits according to their respective proportions. In the absence of all agreements and circumstances, they are to share the profits and losses equally, for in such equality is equity.(b)

But it is not necessary that both circumstances, namely, a community of interest and a community of profits, should exist, in order to create a partnership; for if the whole capital stock belongs to one of the partners, and by agreement is to remain his exclusive property, still if there is a community of profits and losses, there will be a partnership.(c)

1457. Among the partners themselves there is no difference whether the partnership property, held for the purposes of trade or business, consists of personal or movable property, or of real estate, or both, so far as their ultimate rights and interests in it are concerned. This distinction, however, must be observed, that at law, real estate is deemed to belong to the persons in whose name the title by conveyance stands; whether it be in the name of a stranger, or of one of the partners, he is deemed the sole owner, and he alone can make a conveyance of it; it is not, therefore, in this respect to be considered as partnership property. If it be in the names of several of the partners, they are treated as the owners at law, and are joint tenants or tenants in common, according to

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(a) Poth. de Société, n. 12; Waugh v. Carver, 2 H. Bl. 235.

(b) Peacock v. Peacock, 16 Ves. 49; Gould v. Gould, 6 Wend. 263. But see Thompson v. Williamson, 7 Bligh. 432; S. C. 5 Wils. & Shaw, 16.

(c) Ex parte Hamper, 17 Ves. 404.

the terms of the conveyance.(a) But whatever may be the title at law, the real estate will be treated in equity as belonging to the partnership, like personal funds, and disposable accordingly. The persons who hold the legal title will be considered as trustees of the partnership, and accountable accordingly.(b)

With regard to their creditors, partnership property is considered as personalty, and so treated for their benefit; and when it has been impressed with the character of personalty by the agreement of the partners themselves, it will be so considered for the purpose of distribution.(c)

## SECTION 2.—OF THE CAPITAL STOCK.

1458. In the definition given of partnership, it is said to be joining the money, goods, labor and skill of the partners, so that each must put something into the firm which is capable of procuring some profit or benefit for the use of the whole. What is thus put in is called *contribution* or *stock*, and all the stock united forms the *assets* of the firm. The discussion of this subject will lead us to consider, 1, of the necessity of furnishing stock; 2, of what the stock brought into the partnership shall consist; 3, how the stock of each partner shall be ascertained; 4, of the obligation of each partner to furnish what he has promised; 5, of the effect of putting stock into the firm.

### § 1.—Of the necessity of furnishing stock.

1459. One cannot be a member of a partnership

(a) *Anderson v. Tompkins*, 1 Brock. 456, 465; *Coles v. Coles*, 15 John. 159; *McDermot v. Lawrence*, 7 S. & R. 438; *Smith v. Jackson*, 2 Edw. Ch. R. 28; *Yeatman v. Woods*, 6 Yerg. 20.

(b) *Story Eq. Jur.* § 674; *Bisset on Part.* 48; *Sigourney v. Munn*, 7 Conn. 11; *Greene v. Greene*, 1 Ohio, 535; *Hoxie v. Carr*, 1 Sumn. 173; *Baird v. Baird*, 1 Dev. & Bat. Eq. R. 524.

(c) *Story on Partn.* § 93.

without contributing something toward it. If an agreement were made with an individual that he should have a certain portion of the profits without furnishing either capital or services, this would be an agreement to give him such interest, and would not be strictly a partnership between the parties, however they might perhaps be made responsible to third persons.

1460. The stock put into the firm must not be put in under conditions which are repugnant to the contract of partnership; as if Paul should put one thousand dollars into a firm on condition that he should be at liberty to withdraw it at any time, with interest, this would be only a loan; because he would not be entitled to profits, and the property never entered into community otherwise than as a loan.

§ 2.—Of what the stock brought in by the partners should consist.

1461. Every thing which is susceptible of being the object of an agreement, may form a part of the stock which a partner may furnish toward the capital of the firm. Thus a partner may furnish or promise, merchandise, goods, sums of money, or credits. In general the stock which a partner furnishes is considered as being free from the claim of others, but the nature of the things may sometimes, of itself, modify the rights which the partnership acquires over such things; thus when the stock which he furnishes consists of real estate, subject to a mortgage or other lien, the creditors will have a claim against it, as they would have had against a purchaser.

A production of the mind, as the use of a patent right for an invention, or a copy right of a book, may be put in by one partner as stock to the capital of the firm. For the same reason, manual labor, skill and knowledge in the conducting of business, may be put in as stock toward the social capital.

§ 3.—How the amount of stock of each partner shall be ascertained.

1462. It seldom happens that the partners do not themselves fix the amount of stock which each is to furnish. In the absence of all agreement, when they have been silent upon the subject, the presumption is that each has furnished an equal share.

1463. As, in general, the proportion in the profits and losses is governed by the amount of the stock furnished, it is very important not to confound the amount put in by a partner as stock, and the advances he may make to the firm. It sometimes happens that one of the partners undertakes to lend to the firm a certain sum of money, for which he is to charge interest; and not unfrequently there is no express contract to that effect, and yet the partner makes advances; in this case such advances shall not be considered, as between the parties, as stock furnished. An example will show the importance of this rule. Suppose Peter and Paul enter into partnership, and the former puts into the stock twenty thousand dollars, and the latter ten thousand dollars. The firm apply the whole of the capital to purchase from their correspondent in Paris merchandise to that amount. On the arrival of the goods in the United States, Paul, who resides here, receives the goods, and advances ten thousand dollars to pay for their freight, custom-house duties, and other expenses. The sales produce fifty thousand dollars after deducting all charges for selling; in this case Paul shall not be considered an equal partner with Peter, notwithstanding he has furnished the same amount of money which has gone into the partnership funds. He is to be paid first the ten thousand dollars he advanced for freight, duties, etc., and the interest on that sum, and the surplus is to be divided into three parts, one of which will belong to Paul, and the remainder to Peter.

§ 4.—Of the obligation of each partner to furnish what he has promised.

1464. The partners are respectively bound to furnish what they have individually promised to put into the partnership, at the time agreed upon.

1465. When there has been no special agreement, it is presumed that the parties intended that which, from the nature of things, is the most apparent. If merchandise has been promised, it must be delivered in the quantity and of a quality which shall be merchantable, as he would be bound to do toward a purchaser. If rights have been promised, the partner is bound to facilitate their transmission by the requisite indorsements. If the stock he is to furnish consists in the communication of certain discoveries, or of his labor, skill or industry, he is bound to furnish them to the extent of his express engagement, where there is one, or if there be none, according to the nature of things. If he has promised to furnish a certain sum of money, he is bound to furnish it at the time appointed, or if there be no time fixed, then without delay. In all such cases the party contracting is treated as a debtor to the firm to the full amount so to be contributed or paid, from the time when the same became due, as *debitum in presenti, solvendum in futuro*. A court of equity will consider him with regard to such debts, precisely in the same relation to them, as if he were a third person who was a debtor to the partnership.(a)

§ 5.—Of the effect of putting stock into the firm.

1466. When a partner has promised to put into the partnership a certain determinate article, as a house,

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(a) Story on Partn. § 203; Colly. on Partn. 141; Akhurst v. Jackson, 1 Swanst. 89.

one hundred bales of cotton, and the like, he is presumed to guarantee the title to the partnership, according to the extent and the terms of his agreement. If he should put in one hundred bales of cotton, and a third person should afterward bring an action of replevin against the partnership, and recover the cotton, the loss would be that of the partner, because in truth he never put his own cotton which he promised to put into the firm, but the cotton of another. But if the title of the partner to the cotton had been perfect, the moment it was received by the partners, it would belong to the firm, and should it afterward be consumed by fire, the loss would be that of the firm; for the loss of the property is to be borne by the owner: *res perit domino*.

1467. If the partner had purposely put in the cotton of another as his own, this would be such a fraud as would probably induce a court of equity to decree a dissolution of the partnership.(a) And, perhaps, when there was no fraud, but the object of the partnership would be totally lost or greatly injured, the court might make such a decree; as where the partner had in good faith put in a patent right as his share of the capital stock, for the purpose of enabling the firm to manufacture the patented article; and, owing to a want of formality, the patentee had acquired no right to his patent and it had become public.

### SECTION 3.—OF THE DIFFERENT KINDS OF PARTNERSHIP.

1468. There are several kinds of partnerships; they are universal, general, and special or limited, when considered as to the property which is employed by the partners; and private and public with regard to the number of the partners. The rules which are

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(a) Story on Partn. § 288.



particularly applicable to these will be examined under three heads.

§ 1.—Of universal partnerships.

1469. A universal partnership is one where the parties agree to bring into the firm *all their property*, real, personal and mixed, and to employ all their labor, skill and services, in the trade or business, for their common benefit. This kind of partnership, although sanctioned or at least not forbidden by the common law, is yet of rare occurrence; there is, probably, no such thing as a universal partnership, if, by the term, we are to understand that every thing done, bought or sold, is to be deemed on partnership account. Most men own some real or personal estate which they manage exclusively for themselves.(a) These were not unknown among the civilians;(b) Pothier instances the community of goods between husband and wife as a partnership of this kind.(c)

§ 2.—Of general partnerships.

1470. General partnerships are properly such, where the parties carry on their trade and business for their joint benefit and profit; and it is immaterial whether the capital be limited or not, or the contributions of the partners be equal or unequal.(d) The same appellation is given to a partnership where the parties are engaged in one branch of trade only.

§ 3.—Of special or limited partnerships.

1471. Special or limited partnerships are of two

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(a) *United States Bank v. Binney*, 5 Mason, 176, 183.

(b) Dig. 17, 2, 5; Inst. 3, 26. In Louisiana such universal partnerships are allowed, but property which may accrue to one of the parties, after entering into the partnership, by donation, succession, or legacy, does not become common stock, and any stipulation to that effect, previous to the obtaining of the property aforesaid, is void. Civ. Code, art. 2800.

(c) Poth. de Société, n. 28.

(d) *Willett v. Chambers*, Cowp. 814; 2 Bell's Com. 621, 5th. ed.

kinds: 1, those at common law; 2, limited partnerships or partnership in commendam.

*Art. 1.—Of special partnership at common law.*

1472. Special partnerships at common law are those formed for a particular or special branch of business, as contradistinguished from the general business or employment of the parties, or of one of them; they are sometimes called limited partnerships, when they extend to only one transaction or adventure, such as purchasing a particular parcel of goods, and selling them on joint account, or the undertaking of a voyage or adventure to foreign parts on joint account. The natural termination of a partnership for a single dealing or transaction, is the completion of the purpose for which it was formed; but this is not effected until every account or debt relating to the partnership has been settled.(a)

*Art. 2.—Of special or limited partnership by virtue of a statute.*

1473. Several states of the Union have passed laws to authorize limited partnerships, by which the liabilities of the special partners are limited to the amount of the capital furnished by them. The details of these laws are different in the several states of the Union, and nothing more than a general outline of them can be here given. The principles upon which they are founded, are,

1. That the partners shall be classified; those who are liable as in common partnerships, are called *general partners*: the other class, who are only liable for the amount of capital contributed by them, are called *special partners*.

2. The general partners alone have the right to

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(a) *Petrikín v. Collier*, 1 Penn. St. R. 250. See *Bentley v. White*, 3 B. Munr. 263.

manage the business of the firm, and the business is carried on in their names only, and not in the names of the special partners.

3. The agreement between the partners must show what each has contributed, and who are general, and who special partners.

4. The instrument of writing containing the agreement must be recorded in the records of the county where the principal seat of the business of the partnership is.

A special or limited partnership, being an exception to the rules established among partners by the common law, must be clearly proved, it is never presumed; thus, the contribution being limited as to one or more partners, and the management of the affairs of the firm being confided to one of them, do not raise a presumption that there was a limited partnership. But, although all the forms have been pursued according to the requirements of the local statutes, if the special partners violate any of their provisions, as, for example, by acting as general partners, they become liable as general partners.

1474. In Louisiana, there is a kind of partnership called a partnership in *commendam*,<sup>(a)</sup> which is like the French *société en commendite*.<sup>(b)</sup> He who makes this contract is called, in respect to those to whom he makes the advance of capital, a *partner in commendam*.<sup>(c)</sup> This species of partnership is formed by a contract, by which a person or partnership agrees to furnish to another person or partnership a certain amount either in property or money, to be employed by the person or partnership to whom it is furnished, in his or their own name or firm, on condition of receiving a share of the profits, in the proportion determined by the

(a) Civ. Code of Louis. art. 2796, et seq.

(b) Code de Comm. art. 26, 33, Sirey, tom. xii. partie 2, p. 25.

(c) Civ. Code of Lo. art. 2811.

contract, and of being liable to losses and expenses, to the amount furnished, and no more.(a)

SECTION 4.—OF THE LIABILITIES OF PARTNERS TO THIRD PERSONS.

1475. As a general rule, the law presumes that the contracts made by one of the partners in the social name, are made by authority of all the members of the firm, and they are, therefore, all bound to fulfil the engagements of the partners, or of any of them, made in the name of the firm, in the course of the ordinary business of the partnership.(b) And the partnership is also liable for injuries done to third persons by one of the partners in the course of their ordinary business.(c) But to this rule there are a number of exceptions, which will be considered separately.

§ 1.—Of liabilities of partners on contracts.

1476. In general, partners are liable for the acts of one another on contracts made in the social name. The following are exceptions to this general rule:

1. The partners generally will not be liable when one of the partners, without the consent of the firm, signs or indorses the name of the firm to a note, as surety for a third person, in which the partnership *has no interest*, and which is *not in the course of their usual business*.(d) When it appears upon the face of the papers that the partnership name has been given as surety for such third person, and not for a partnership debt, the proof of that fact becomes unnecessary; but when it was indorsed in an ordinary manner, such

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(a) Civ. Code of Lo. art. 2810.

(b) Tillier v. Whitehead, 1 Dall. 269; Moddewell v. Keever, 8 W. & S. 65.

(c) Nesbet v. Patton, 4 Rawle, 120.

(d) Laverty v. Burr, 1 Wend. 529; Catskill Bank v. Still, 15 Wend. 364.

proof must be given, unless the fact is established that it was not given for a partnership debt, and the person to whom it was passed knew it; then it does not matter what the form of the instrument may be, it does not bind the partners who did not assent to it.(a)

2. The partnership will not be bound by the act of one of the partners when he misapplies the funds, securities, or other effects of the partnership in discharge of the payment of *his own private debts*, claims or contracts. In cases of this kind, the creditor dealing with the partner and knowing the circumstances, as he must do, is deemed to act *malâ fide*, and in fraud of the partnership; the transaction by which the funds, securities, and other effects of the partnership had been so obtained, will be treated as a nullity.(b) Upon the same grounds, a note given by a partner in the name of the firm, for the payment of the partner's private debt due to the payee, will not be binding upon the other partners.

But this apparent misapplication of the funds or credits of the firm, may be shown to have been made with the express or implied consent of the other partners, and in that case, the partnership will be bound. If there is not some ingredient in the case importing some knowledge or suspicion of *malâ fides*, or some sufficient ground to put the creditor upon further inquiry, he may well suppose the individual partner has acted in good faith, under the express or implied authority of his copartners.(c)

3. The fairness which is required in all contracts, requires that a party dealing with a partner in the name of the firm should be free from suspicion or knowledge that the partner so dealing with him is

(a) Foot v. Sabin, 19 John. 154, 158; Dobb v. Halsey, 16 John. 38.

(b) Gow on Partn. 60, Philad. ed.

(c) See Ex parte Bonbonus, 8 Ves. 540; Ridley v. Taylor, 13 East, 175; Story on Partn. §§ 132, 133.

violating the obligations which he owes to his copartners. In order to bind the partnership, the contract must not only be within the scope of the business of the partnership, but the party with whom it is made must *neither know nor suspect* that the partner is acting in *opposition to the wishes of his copartners*; for when he possesses such knowledge, the contract will not bind the firm, however obligatory it may be upon the individual partner.(a)

4. When a contract is made by one partner in the name of the firm *in fraud of the other partners*, they will be bound to third persons, if dealing with him innocently; but if the party dealing with the fraudulent partner, knew or participated in the fraud, the contract of the other partners would be void.(b) For example, if one partner borrows money for his own separate use, and gives the note of the firm for this individual debt, without the assent of the firm, and the lender of the money knows what use is to be made of it.(c)

5. The firm will not be bound when a partner makes a contract with a third person, although it be for the benefit of the firm, if *the credit* was given to the *individual partner only*; as if money be borrowed by one of the partners in his own name, and it is applied to the use of the firm.(d)

6. When a partnership, composed of several persons, is conducted in the name of one of the partners, and the partner also does business in his own name, and contracts a debt; in the absence of all circumstances to show that the credit was given to the firm, the

(a) *Stainer v. Tyson*, 3 Hill, R. 279; Poth. Ob. n. 83; Poth. de Société, n. 101; Colly. on Partn. 262, 2d ed.

(b) Gow on Partn. 181; Colly. on Partn. 293, 2d ed.

(c) *Miller v. Munice*, 6 Hill, 115. See *Breckenridge v. Shrieve*, 4 Dana, 375.

(d) Colly. on Partn. 319, 2d ed.; *Emly v. Lye*, 15 East, 7; *Siffkin v. Walker*, 2 Camp. 308; *Graeff v. Hitchman*, 5 Watts, 454. See *United States v. Astley*, 3 Wash. C. C. R. 508.

partners will not be bound; in such case the credit is given *to the partner in his individual capacity.*(a)

7. It sometimes happens that two different sets of partners carry on business in the same social name, and that one of the partners is a member of both firms. When there is a confusion in this respect, the partners of *one firm* may, in some cases, be made responsible *for the debts of another*. For example, where three persons carried on trade under the firm of King and Company, and two of those persons with another, under the same social name, carried on another partnership; a bill in the name of the firm, which was drawn on account of the one partnership, was made the ground of an action of *assumpsit* against the other. Lord Kenyon was of opinion that this company was liable; that the partner not connected with the company that drew the bill, having traded along with the other partners under that firm, persons taking bills under it, though without his knowledge, had a right to look to him for payment.(b) But it would seem, 1st, that any act distinctly indicating credit to be given to one of the partnerships, will fix the election of the creditor to that company; and, 2dly, that making a claim on either of the firms, or when they are insolvent, on either of their estates, will have the same effect.

§ 2.—Of the liability of partners for the acts of each other for torts.

1477. It may be laid down as a general rule, that the partnership is liable for torts done in the course of the partnership concerns, or by one of the partners under color of acting for the firm; and partners will

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(a) *United States Bank v. Binney*, 5 Mason, 176; S. C. 5 Pet. 529; *Elbridge v. Binney*, 9 Pick. 272. See *Mifflin v. Smith*, 17 S. & R. 165.

(b) *Baker v. Charlton*, Peake's N. P. Cas. 80; *McNair v. Fleming*, Mont. on Partn. 32, n. (r); *Phillips v. Paxton*, 3 Mart. N. S. 39; 7 East, 210; 2 Bell's Com. 670, 5th ed.

be liable, although the act may not in fact have been assented to by all the partners; thus, for example, if one of the partners should commit a fraud in the course of the partnership business, all the partners will be liable for the injury, although they have not concurred in the fraud. Indeed, the partnership may be held liable for a libel, which was told by one of the partners in the course of the business of the firm.

1478. But as a general rule, a tort committed by one partner will not bind the partnership, unless it be either authorized or adopted by the firm, or be within the proper scope and business of the partnership.

#### SECTION 5.—OF THE RIGHTS OF PARTNERS AGAINST THIRD PERSONS.

1479. Having discussed the principles of law by which partners become liable to third persons, we come, naturally, in the next place, to consider the rights of partners against third persons. As in treating of the liabilities of partners, the subject was divided into two sections, the same plan will be adopted here, by considering their rights against third persons: 1, on contracts; and 2, in relation to torts committed against them.

##### § 1.—Of the rights of partners against third persons on contracts.

1480.—1. Whenever a contract has been made between the partners and a third person or persons, or by one of the partners in the name of the firm, and such third persons have engaged to perform or do any thing for the benefit of the partnership, it is clear that the partners jointly have a right to enforce its performance, and they may, indeed must all join as plaintiffs, when recourse is had to law to enforce



such right by action. But to this general rule there are several exceptions.

1. When one of the partners who makes the claim against the third persons, is liable as a partner of another firm, so that if a suit were brought, he must be both plaintiff and defendant; as where A, B, and C are partners, trading under the name of A, B, and C, have a claim against D, E, and C, trading under the name of D, E, and Company; it is evident here that C, being a partner in both firms, must be made plaintiff and defendant; (a) in this case, it is clear, the creditors having no remedy at law, must have recourse to equity, where, although all parties in interest must join, and be joined in the suit, even when the controversy is between two firms, in each of which some one or more of them are partners. (b)

2. A second exception may arise in consequence of the incompetency of one of the partners to maintain a suit, from his peculiar national character, or other circumstance. Thus the rights of a partnership are suspended during a state of war with the United States, when one of the partners is domiciled in an enemy's country, or is a subject or citizen of such belligerent state, and claiming in this country; the reason of this is, that a state of war suspends all commercial intercourse between the belligerents, and shuts their courts against all suits and proceedings, and all claims of persons who have obtained or retain a hostile character. This right, however, is only suspended, for on the return of peace, or when the alien enemy loses that character, his rights return, and with them those of the partnership.

1481.—2. To entitle the partnership to a right against third persons, the contract must have been

(a) *Bosanquet v. Wray*, 6 Taunt. 597. See *Jacaud v. French*, 12 East, 317; *Sparrow v. Chisman*, 9 Barn. & Cr. 241; *Bailey v. Banker*, 3 Hill, 188.

(b) 1 Story, Eq. Jur. § 666 et seq.

made in the name of the firm making the claim, or, at least, for the benefit of the partnership. It is clear that when the contract is made in the name of the firm, the partners have a joint right against the person or persons who have agreed to perform something for or to pay a sum of money to the firm.

We have seen that when a partner makes a contract in his own name only, the obligations on his part are limited to himself, and he alone is entitled to all the advantages to be derived from it; but to this rule there is an exception. When the contract is made by one partner in his own name, for and on behalf of the partnership or for its benefit, the firm will be bound by it; and so on the other side, if the benefit is intended for the firm, it will be entitled to all the advantages to be derived from it: if, for example, a contract of guarantee should be entered into apparently with one partner, but in reality it should be intended for the indemnity of the firm for advances to be made by the partnership, an action might be maintained by all the partners, as upon a joint contract with the partnership, although the written papers containing the guarantee should be addressed to one of the partners, and he alone should conduct the negotiation; (a) but in such case it must appear that the contract, although made by one partner, was for the benefit of the firm. (b)

1482.—3. When new partners are admitted and old ones go out of a firm, and the name of the firm is not changed, and as usual the property and securities of the existing partnership remain, and become a part of the funds of the new firm; though the latter are entitled in equity, they have no right at law, which they can enforce, on the contracts of the old firm, and

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(a) *Garrett et al. v. Handley*, 4 Barn. & Cr. 664. See *Alexander v. Barker*, 2 Crompt. & Jerv. 133.

(b) *Garrett v. Handley*, 3 Barnw. & Cr. 462.

if suits are to be brought to recover on such contracts, they must be in the names of the partners of the old firm.(a)

1483.—4. Sometimes contracts entered into with a firm are of a continuing nature; as when a guarantee is made or given for advances, or credits to be given at a future time by a particular firm, and afterward the firm is changed, either by admitting a new partner or by one of the old ones retiring, as above mentioned, the name remaining the same; and on the faith of this guarantee, advances are afterward made, it has been held that the guarantor was not responsible, because his contract was not with the members of the new firm.(b)

§ 2.—Of the rights of partners against third persons for their torts.

1484. When the partners have sustained an injury in consequence of any tort committed by strangers to their property or rights as such, and they have suffered joint damages, they have a right to redress for the wrong. If, therefore, a slander of the firm, or a libel has been published, and the partners have received a joint injury, they may maintain a joint action against the slanderer, and may recover such damages as the firm has sustained for the joint tort; but in such case, the damages must be strictly limited to the injury to the partnership, in their joint trade or business, and no damages can be recovered for the injury to the feelings of the individual partners.(c)

They are likewise entitled to an action against third persons for any other injury to the partnership

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(a) Colly. on Partn. B. 3, c. 5, § 1.

(b) Colly. on Partn. B. 3, c. 4, § 1; *Cramer v. Higginson*, 1 Mason, 323.

(c) *Haythorne v. Lawson*, 3 C. & P. 196.

property, when the injuries are to their rights as partners.

SECTION 6.—OF THE DISSOLUTION OF PARTNERSHIP.

1485. The subject of the dissolution of the partnership will be considered by taking a view of, 1, the means by which it takes place; 2, the effect of the dissolution.

§ 1.—Of the means by which a partnership is dissolved.

1486. This is done, 1, by the acts of the parties; 2, by the operation of law; 3, by the decree of a court of equity, or the award of arbitrators. These will be separately examined.

*Art. 1.—Of dissolution by the acts of the parties.*

1487. It is clear that the parties who have formed a partnership, have a right to alter or change their contract in any manner they please, when they are all united, whether the contract of partnership be for a limited or an unlimited period.

When the partnership has been created for a definite period, and the same power which gave it birth limited its duration, the moment when its existence is to cease arrives, it has no longer any life. It ends as a matter of law and of right by the mere efflux of time. But it frequently happens that it is prolonged by the acts of the parties, either express or implied; when the act is an express one, the partnership acquires a new existence, upon the terms and conditions which the partners please to give it, as they did in the original contract. When, on the contrary, the partnership is continued by the implied conduct of the parties, it is not always easy to determine what their acts intended; these depend upon the situation of the parties, and upon circumstances which may qualify or explain

them. In the absence of all such controlling circumstances, when the business is carried on after the time has expired during which the partnership was limited, it will be considered as renewed upon the same terms, as to the interests and rights of the partners, as they had under the original agreement, but the new partnership will be treated as a mere partnership to continue during the will and pleasure of the parties, and it may, therefore, be dissolved by any one of them whenever he may deem proper to do so.(a)

1488. A question may arise whether, when the time of duration of the partnership is fixed, either partner has a right to withdraw from the firm and by that means dissolve the partnership, becoming subject to the other partners to an action for the breach of his agreement to continue the partnership. The better opinion seems to be that no such right exists, though judgments and opinions have been given both ways.(b)

1489. The partnership may be limited to expire upon the happening of an uncertain event, and not before; in this case it requires the concurrent act of all the partners to dissolve it until the event has happened, and on the happening of the event it is dissolved as a matter of course, unless continued by the consent of all the parties to it: for example, if two persons, otherwise unconnected in business, should join in an enterprise, voyage or other adventure, for their joint account and mutual profit, as by hiring a ship for a particular voyage, and the ship

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(a) *United States Bank v. Binney*, 5 Mason, 176; *Miffin v. Smith*, 17 S. & R. 165; *Featherstonhaugh v. Fenwick*, 17 Ves. 299.

(b) See Story on Partn. § 275; 3 Kent's Com. 54, 55, 61, 4th ed.; Story, Eq. Jur. § 668. The cases favorable to the right of one partner to dissolve the partnership by his own act, before the expiration of the limited time, are *Marquand v. The New York Manufacturing Company*, 17 John. 525, and the dictum of Mr. Justice Platt, in *Skinner v. Dayton*, 19 John. 538. The cases against the right are *Pierpont v. Graham*, 4 Wash. C. C. Rep. 234; *Peacock v. Peacock*, 16 Ves. 56; *Crawshay v. Maule*, 1 Swanst. 495; *Bishop v. Breckles*, 1 Hoff. Ch. R. 534.

should have performed the voyage, the whole of the business agreed to be done by the partnership having been accomplished, the social contract would be at an end, by the mere occurrence of the event and the lapse of time.(a) But a distinction must be observed between the completion of the affair undertaken, by which the social contract is to end, and modifications and changes which may be made in it; thus, if a firm contracted to execute a public work, according to a known plan, and that the partnership should continue till it should be completed, it would not be dissolved by the simple circumstance that the government had changed the plan, a right which had been reserved, if the partners have continued the work, which is of the same kind.(b)

1490. In those cases where there are no certain limits to the duration of the partnership, it is deemed to be a mere partnership at will, and therefore dissoluble at any time, by the act of either or of all the partners.(c)

*Art. 2.—Of the dissolution of partnership by operation of law.*

1491. A partnership is dissolved by operation of law upon various grounds, which will be separately considered.

1. *By a change in the condition or state of the parties.*

1492. When a partnership is formed, the parties to it must be *sui juris*, and the presumption is that they

(a) Gow on Partn. c. 5, s. 1; Story on Partn; § 280.

(b) Pard. Dr. Com. n. 1053.

(c) By the Roman and the French law, the partner is not allowed to dissolve the partnership at an unseasonable time, when the dissolution would be particularly injurious to the other partners. Poth. de Société, n. 149. Code Civil, art. 1869, 1870, 1871. The same rules have been substantially adopted in Scotland, 2 Bell's Com. 532, 533, 5th ed.; Ersk. Inst. B. 3, c. 3, § 26; and in the state of Louisiana, Civil Code of Lo. art. 2855—2859. There does not appear to be any direct authority in the English law as to whether a partner will or will not be restrained from breaking up such partnership, in consequence of its being unseasonable. *Crawshay v. Maule*, 1 Swanst. 509 to 514, note.

will continue so; the social contract, then, is made upon that implied condition. The dissolution of the partnership must, therefore, take place whenever one of the partners becomes incapable of acting *sui juris*. This is the case whenever a partner is put under actual tutelage or guardianship by reason of idiocy, insanity, or because of any excessive weakness or vice, such as drunkenness. (a)

1493. Upon the same principle, probably a dissolution would take place where one of the partners was convicted of a felony, and confined in a penitentiary, for, in that case, he would not fulfil the duties incumbent upon him as a partner, any more than if he had been insane. Besides, it would be unjust to subject an honest and an honorable man to continue an association with a felon. (b) But in these cases the contract would not be dissolved by the simple fact of the conviction, but would be good ground to apply to a court of equity to dissolve the social compact.

1494. The marriage of a female partner would, for the like reason, cause a dissolution of the partnership by operation of law, for two reasons: first, by the marriage, at common law, the whole of the personal

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(a) Watson on Partn. 382; Gow on Partn. 269.

(b) Duvergier, in his *Droit Civil Français*, tome 5, n. 450, says, "La confiance personnelle, à dit M. Treilhard, est la base du contrat de société." M. Locré, tome xiv. n. 524. Si donc la conduite d'un associé est telle que cette confiance ne puisse plus exister dans l'esprit de ses co-associés; si, par exemple, il commet des fautes multipliées: à plus forte raison s'il se rend coupable de malversations, on a droit de demander contre lui la dissolution. Il avait virtuellement promis d'être habile et honnête; il manque à son obligation, ses co-associés sont dégagés. Ce n'est pas seulement d'après leurs relations entre eux qu'il convient d'apprécier la moralité des associés; des actes étrangers aux affaires sociales, qui seraient de nature à enlever à l'un d'eux la considération dont il jouissait au moment de la formation de la société, pourraient justifier une demande en dissolution. Qui voudrait condamner des hommes d'honneur au supplice d'un contact perpétuel avec un homme justement flétri par des condamnations judiciaires, ou par l'opinion publique! La gravité des faits, la nature et la fréquence des rapports qu'exige le caractère particulier de la société, seront pesés par les magistrats; et s'ils jugent que le lien social est devenu insupportable par la faute de l'un de ceux qui l'ont formé, ils le rompent."

property of the wife becomes vested in the husband in his own right,(a) unless there is some valid contract to the contrary; secondly, the marriage makes her incapable to enter into any valid contract.(b)

2. *By the transfer by operation of law or assignment by one partner of his interest in his social funds.*

1495. Though a partner cannot by his own act withdraw from a partnership until the time limited for its duration has expired, yet if he make a *bona fide* voluntary sale of all his right, title and interest in the partnership property and effects, that will at once dissolve the partnership, and convert the assignee or purchaser into a tenant in common with the other partners; for no man can force his copartners to accept the purchaser as a member of the firm which he has just left.(c) If such consent be given, then the old partnership is dissolved, and a new one is formed.

Such a general assignment by one of the partners will have the effect of dissolving the partnership, when the duration was unlimited, for the act of making it will be an election to dissolve, which he had a right to do.(d)

But in some cases the assignment is involuntary, *in invitum*, under judicial process. The share of a partner in the partnership property may be seized and sold for the separate debt of the partner; when the execution is levied upon the whole of the tangible goods, or upon a part of them, and a sale of the right, title and property of them takes place, the purchaser becomes entitled to the judgment debtor's right, title and interest in the same, as it shall appear upon a

(a) In some states, a provision is made by statute that the personal property of the wife shall remain hers.

(b) *Nerot v. Burnard*, 4 Russ. 247.

(c) *Marquand v. The New York Man. Co.*, 17 John. 525; *Rodrigues v. Heffernan*, 5 John. Ch. R. 417; *Nicoll v. Mumford*, 4 John. Ch. R. 522; *Cochran v. Perry*, 8 W. & S. 262.

(d) 17 John. 525, 529.



final settlement and adjustment of the partnership concerns. By operation of law, on the completion of the levy and sale the purchaser becomes a tenant in common with the other partners, and the partnership is thereby dissolved.

*3. Of the dissolution by bankruptcy.*

1496. The bankruptcy of the whole of the partners will of course dissolve the partnership, for the whole of the property of the firm passes to the assignees, for distribution among the creditors. When only one of the partners becomes bankrupt, his interest in the partnership property passes to his assignees, and this has the same effect of destroying the partnership, the assignee being a tenant in common with the solvent partners, and entitled to the bankrupt's share upon a final settlement of the social concerns.

The insolvency of all or of one of the partners, and an assignment under the insolvent laws, will have the same effect, for the property passes to assignees for the benefit of creditors.

*4. Of dissolution by war.*

1497. A state of public war between two countries, causes a suspension of all commercial intercourse ; the courts are closed against the enemy ; the property of alien enemies is liable to capture and confiscation, and no communication of an amicable nature can exist between the citizens or subjects of two countries thus at war. This will of itself dissolve a partnership, existing at the time of the declaration of war, when some of the partners are the citizens of one, and the others are citizens or subjects of the other country. And as the domicile, and not the natural allegiance of the partners, makes them enemies or not, it follows, that when some of the partners are residents in the enemy's country, they will be considered enemies,

and their share of the partnership property is liable to capture and condemnation, although the partnership establishment is in a neutral country.(a) And when the partnership is established in the enemy's country, it is treated throughout as hostile, and the whole of the partnership property is liable to be considered as the enemy's property, although some of the partners may be domiciled in a neutral country.(b) When, in these cases, there is an utter incompatibility created by operation of law, between the partners as to their respective rights, duties, liabilities, and obligations, both public and private, a dissolution must necessarily result from it, whether the parties consent to it or not; the dissolution is created by operation of law.(c)

*5. Of the dissolution by death.*

1498. The object which the several persons who enter into partnership have in view, when they form the social contract, is to promote their several fortunes by the aid and assistance of their fellows; one partner may possess qualifications for one branch of the proposed business, and another may understand some other branch of it. By uniting their skill and knowledge they may promote each other's interest and welfare. As the end of the partnership is destroyed by the death of one or more of the partners, it follows that the partnership is dissolved by such an event. But independently of the personal advantage which the deceased partner might be to the firm, in a pecuniary point of view, there is another valid reason why the partnership should end with his death. A man may be willing to be the partner with one man without having any reason but his choice, and be unwilling

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(a) *The Franklin*, 6 Robins. 127.

(b) *The Friendschaft*, 4 Wheat. 105; *The San Jose Indiano*, 2 Gallis. 268; *The Vigilantia*, 1 Robins. 1.

(c) *Griswold v. Waddington*, 15 John. 57; *S. C.* 16 John. 438.

to be the partner of another ; if the partnership should be continued, it must of course be with the representatives of the deceased, and these might be the foes of the surviving partner. These principles are so consonant with reason, that perhaps in all the modern codes they have as much force, as they have in the common law.(a)

1499. Though death doubtless dissolves the partnership, it has been questioned at what time it operates the destruction of the firm ; whether from the moment it takes place, or from the time it becomes known to the other partners. The dissolution takes place from the time of the death, whether such death be known or unknown, not only with regard to the partners themselves, but in relation to third persons.(b)

The reasons above advanced to show that a partnership must be considered dissolved by the death of one or more partners, applies only in cases where the parties have not otherwise provided ; for the parties may make a partnership which shall exist, notwithstanding the death of one of the partners ; and the whole or only a part of the assets of the deceased may be made liable for the debts contracted after the death.(c) And a testator may also make his assets liable for the whole of the partnership debts which may accrue, and provide for the continuation of the partnership by his last will and testament.(d)

6. *Of the dissolution by the extinction of the thing which is the object of the partnership.*

1500. The extinction and absolute loss of all the things which form the common stock of a partnership,

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(a) Inst. 3, 26, 5 ; Dig. 17, 2 65, 9 ; Poth. de Société, n. 144.

(b) Vulliamy v. Noble, 3 Mer. 593 ; 2 Bell's Com. 639, 5th ed. ; Caldwell v. Stileman, 1 Rawle, 212.

(c) Knapp v. McBride, 7 Ala. 19 ; Gratz v. Bayard, 11 S. & R. 41.

(d) Burwell v. Mandeville's Executors, 2 How. U. S. 560.

has the effect of dissolving it. For example, if two merchants, not otherwise partners, should buy a ship, to be employed on joint account, and the ship should be lost, the partnership will be at an end. (a) Again, suppose that a partnership should be formed for the purpose of buying the whole of a patent right to a new invention, and for selling such right to certain districts, and in consequence of some negligence in not fulfilling the requirements of the law, or of the repeal of the law granting such right, the right should be lost, there would be nothing for the partnership to operate upon, there would no longer be any community, and, therefore, the partnership would be dissolved.

But when only a part of the partnership stock has been lost, the effect will not be the same in every case. A distinction must be made between cases where the property furnished by the partners is partially lost, and where the part which one was to furnish, is wholly lost. In the first case, the partnership shall be continued with the remainder of the stock; as where one merchant had put into the common fund one ship, the *George Washington*, and the other another, the *Napoleon*, and after they became the joint property, the *Napoleon* was lost, the partnership would not, on this account, be dissolved, but the business of the firm would be carried on with the other ship. But if, on the contrary, the partners were each to furnish only the *use* of a thing, and that thing should be lost, the partnership would necessarily be dissolved; for example, if two persons, each owning a ship, should agree to form a partnership of the *profits* which should arise from the trade of the two ships between New York and Liverpool, and one of the ships should be lost, the partnership would be dissolved, and the owner of the lost ship would be entitled to

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(a) 4 Pardessus, Dr. Com. § 1054; Story on Partn. § 280.

the profits only up to the time when his ship was cast away. Again, suppose that Peter and Paul have entered into partnership, and by their agreement Peter is to furnish canvas on which Paul is to paint pictures, and Peter engages to sell them on joint account; now if Paul, whose work was to be put upon the canvas, should become paralyzed, so as to be totally disabled to fulfil his contract, the partnership would be at an end.(a)

This cause of dissolving the partnership, by the loss of the property which is the subject of it, may also be ranked among the cases in which the social compact is dissolved by the consent of the parties, for it is fair to presume that such was their intention.

*Art. 3.—Of the dissolution by an award and judicial proceedings.*

1501. The courts of common law have no jurisdiction to decree a dissolution of a partnership, for any cause whatever. A submission and award may have the effect of dissolving a partnership. When the submission refers, by the express terms it contains, the question whether a partnership shall or shall not be dissolved, and an award directly awarding the dissolution is made, it will, if it be unimpeached and unimpeachable, *ipso facto*, amount to a positive dissolution.(b)

Courts of equity, or those possessing equitable powers, may, for just cause, decree a dissolution of the partnership, and declare it void *ab initio*, or only from the time of the decree.

*1. Of the dissolution ab initio.*

1502. The causes for which a partnership will be dissolved *ab initio* must have arisen before the forma-

(a) Pothier, Du Contrat de Société, n. 142. See Pardessus, Dr. Com. partie 5, tit. 3, ch. 1, s. 3.

(b) Wats. on Partn. ch. 7; Gow on Partn. ch. 5, s. 1.

tion of the partnership, for if there was no unfairness, at that time, the partnership was properly formed, and it cannot therefore be dissolved by a court of equity, for any than causes which have since occurred. The grounds upon which a partnership will be so dissolved, are fraud, imposition, misrepresentation, or oppression in the original agreement for the partnership.(a)

*2. Of the dissolution from the time of the decree.*

1503. The causes which arose since the formation of the partnership, for which a dissolution will be decreed, are naturally divided into, 1, those founded on the alleged misconduct, or fraud, or violation of duty of a partner; 2, those where no blame is attached to either partner.

*1° Of the dissolution for misconduct since the formation of the partnership.*

1504. As to the *nature* of the misconduct for which a dissolution will be decreed, it is to be observed that every trivial departure from duty, or unimportant violation of the articles of partnership, or trifling fault, will not be sufficient to found a decree upon; as where a partner exhibits a moroseness of temper, or occasionally disputes with the other, or does any other similar act, which does not essentially obstruct or destroy the pecuniary rights, or interests, or operations of the partnership; for although these may be inconvenient grievances, a court of equity has no jurisdiction to prevent them.

1505. Whenever the conduct of one partner is such as materially to affect the pecuniary rights of the others, such as gross misconduct or abuse of authority, or gross want of good faith or diligence, which render it impracticable to carry on the business with advantage, or which would be positively ruinous to the interests

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(a) 1 Story on Eq. Jur. § 222, 240.

of the partnership, a court of equity will interfere, and decree a dissolution.(a) But to support such proceedings a clear case of abuse, or of imminent and threatened danger, must be fully made out. When the danger is only prospective, instead of dissolving the partnership, the court will, when a proper case is made out, grant an injunction to prevent the threatened injury.(b)

There may be many circumstances of a less grave nature, which will justify a court of equity in dissolving a partnership, as the long absence of a partner abroad, for his mere pleasure, or for the purpose of attending to his own separate affairs, to the neglect or detriment of the business of the partnership; or his voluntary engagements in pursuits which are injurious to the social affairs; or changing his domicile, voluntarily, to another country, and many similar acts.(c)

*2° Of the dissolution where there is no misconduct in either party.*

1506. The cases for which a dissolution will be decreed by a court of equity, when neither party is to blame, may be classed principally into those where, 1, the business to be carried on is impracticable; 2, one of the partners becomes unable to fulfil his part of the contract; 3, the partner becomes insane; 4, the happening of an event on which the existence of the partnership was to cease.

1507.—1. When there is a total *impracticability* of carrying on the business for which the partnership was formed, and the further continuance might prove highly detrimental or ruinous to some of the partners,

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(a) Story, Eq. Jur. § 673; Collier on Partn. book 2, c. 3, § 3; Gratz v. Bayard, 11 S. & R. 41; 1 Mont. on Partn. part 3, c. 1; Gow on Partn. c. 5, § 1; Watson on Partn. 381.

(b) Eden on Inj. 359; Story on Partn. § 224, 287, 288; Charlton v. Poulter, 19 Ves. 148, note (c).

(c) See Whiteman v. Leonard, 3 Pick. 177; Arnold v. Brown, 24 Pick. 89.

a court of equity will decree a dissolution; as, where the parties had undertaken to work a mine, which turns out to be wholly unproductive, or where it becomes so filled with water that it cannot be dried without great loss and ruin; or where the parties have associated for the purpose of introducing a new invention which turns out to be worthless.(a)

1508.—2. In the second place, a partnership may be judicially dissolved on account of the *incapacity of one partner* to perform his obligations and duties, and to contribute the skill, labor and diligence toward the promotion and accomplishment of the objects for which the partnership was formed, which he had engaged to perform; as in the case already mentioned of a partner who engaged, on his part, to paint pictures, and where the other agreed to furnish the canvas and sell the pictures on joint account, and the painter became paralyzed. It must be observed, however, that every inability will not be a ground for dissolution, and these cases are of infinite delicacy. There is no standard by which it can be ascertained how long a term of inability may justify measures of this description. A broken leg, or an accidental blow, may incapacitate a partner for a time, as much as a permanent disease. Much must depend upon the circumstances of each case, and no general rule can be laid down. But when the agreement is not that the partner shall himself personally perform the work or contribute his skill to the business of the partnership, but such work may be performed by another in his place, he may justly oppose the dissolution of the partnership by finding a competent substitute at his own expense.(b)

1509.—3. For a similar reason the *insanity* of a partner, by which he has become permanently

(a) 3 Kent, Com. 60, 4th ed.; Gow on Partn. ch. 5, s. 1, 3d ed.; 2 Bell's Com. 633, note (2), 5th ed.; Collier on Partn. book 2, c. 3, s. 3.

(b) Vide Poth. h. t. n. 142; Duvergier, Dr. Civ. Fr. tome 5, n. 448.



incapable of fulfilling his obligations toward his associates, may be a ground of dissolution. When the partner has been found a lunatic by a regular inquisition, there can be but little doubt that it is sufficient ground for a dissolution, and perhaps the fact that a committee or guardian has been appointed for him, is itself a dissolution, for then he has no right in the business of the firm, which he can himself exercise; still some authorities seem to justify the idea that to make a complete dissolution on the ground of insanity the other partners must go into equity.<sup>(a)</sup> But although on principle, it might, perhaps, be contended that the partnership is dissolved by the fact of his insanity,<sup>(b)</sup> yet it appears to be well settled that before inquisition found, insanity does not, *per se*, amount to a dissolution of the partnership, and to accomplish that object the aid of a court of equity must be invoked.<sup>(c)</sup> And before a decree dissolving the partnership will be made, proof of permanent insanity, of a nature to disqualify the partner to perform the obligations which he owes to the firm, will be required; for if the malady is merely temporary, or there is a prospect that it will be cured, the partnership will not be dissolved.<sup>(d)</sup>

1510.—4. The happening of an event, on which by the social compact the partnership was to end, as, where a resolatory condition was foreseen by the con-

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(a) Story on Partn. § 295, note 1. Vide Contra, *Ialer v. Baker*, 6 Humphr. 85.

(b) The argument in favor of the theory that a partnership is dissolved by the act of insanity itself, is, that the partners when acting individually in the transaction of the business, act as the agents of the other partners, and, as a crazy man cannot have an agent, this presumption, of having given authority, is rebutted by the fact, that the man is incapable of appointing one. Would a deed of sale, it has been asked, by a person manifestly insane at the time, be valid? If not, can that of his agent be in a better condition?

(c) *Sayer v. Bennett*, 1 Cox, 107, 109; *Walters v. Taylor*, 2 Ves. & Bea. 299; *Jones v. Noy*, 2 M. & K. 125; 3 Kent's Com. 58; *Griswold v. Waddington*, 15 John. 57.

(d) *Jones v. Noy*, 2 Mylne & K. 125; *Gow on Partn.* c. 5, s. 1.

tract; this would doubtless be a sufficient ground for a court of equity to interfere.

§ 2.—Of the effects of the dissolution.

1511. The dissolution affects the rights of creditors and those of the partners; these will be considered separately in two articles.

*Art. 1.—How the dissolution affects creditors.*

1512. This article will be divided into two parts: 1, who are to be considered creditors; 2, what assets will be liable for the payment of debts.

1. *Who are to be considered creditors.*

1513. In whatever manner the dissolution has taken place, whether by the acts of the parties, the operation of law, the award of arbitrators, or the decree of a court of equity, the rights of persons who were creditors, at the time of the dissolution of the partnership, are in no wise affected, changed or varied by that act. (a) Further, the dissolution does not relieve the partners from their liabilities to third persons, for any contract which may be made by one of the partners in the name of the firm, unless notice, actual or constructive, has been given to such persons that the partnership has been dissolved; for, when a partnership has once been formed, it is considered as continuing, as to third persons, until notice of its dissolution. (b)

1514. When notice of the dissolution is required, in order to exonerate the partners from further liability, its *publication* is sufficient with regard to all persons who have not had dealings with the firm, when it is

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(a) *Forrest v. Waln*, 4 Yeates, 337.

(b) *Thurston v. Perkins*, 7 Mis. 29; *Princeton and Kingston Turnpike Co. v. Gulick*, 1 Harr. 161.

made in some newspaper of general circulation ;(a) but, when persons have dealt with the firm, a special notice of the dissolution will in general be required, and a newspaper notice will not be sufficient,(b) unless brought home to the party.

There are some cases where a notice of the dissolution of the partnership is *not requisite*; these are, 1, where the dissolution takes place in consequence of the death of a partner; 2, where it happens by the bankruptcy of one of the associates; and 3, in case of the retirement of a dormant partner.

In the cases of *death* and *bankruptcy* no notice is necessary, because the partnership is dissolved by operation of law; a dead man cannot be bound by any contract whatever, nor his estate affected by any engagement made by the surviving partners; and in case of bankruptcy, the notoriety of the proceedings, being matter of record, is equal to a notice.

With regard to a *dormant* partner, no notice is required to shelter him from liability for any debts or contracts of the firm after he has retired. His liability began *de jure* when he went into the firm; and, no credit was in fact given to such partner after the dissolution, for it was unknown that he was a member of the firm, at the time the credit was given. He became liable by operation of law, independent of his intention, in consequence of participating in the profits of the concern, and, as soon as such participation ceased, by his retirement, by operation of law his liability ceased also, whether notice were given or not. But such a partner will not be considered as dormant with regard to persons who knew him to be a partner,

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(a) *Shurlds v. Tilson*, 2 McLean, 458; *Mauldin v. Branch Bank*, 2 Ala. 502; *Gallicott v. Planters and Mechanics' Bank*, 1 McMullan, 209; *Lansing v. Gaines*, 2 John. 300; *Graves v. Merry*, 6 Cowen, 701.

(b) *Williamson v. Bank of Pennsylvania*, 4 Whart. 482; *Prentice v. Sinclair*, 5 Verm. 149; *Wardwell v. Haight*, 2 Barb. Sup. Ct. R. 549; *White v. Murphy*, 3 Rich. 369.

and, as to them, he will be liable, unless notice be given.(a)

1515. The dissolution will not absolve the partners from liabilities to third persons for any contract that any partner may have made afterward in the name of the firm, unless it appears,

1. That the creditor had due notice of the dissolution ; or,

2. That he had no transaction with the firm until after the dissolution ; or,

3. That the partnership was not general, but limited to a particular purchase, adventure, contract, or voyage, and it was terminated before the debt was created ; or,

4. That the new transaction was not within the scope of the original business of the partnership ; or,

5. That it is illegal, fraudulent, or void ; or,

6. That the person sought to be charged had been a dormant partner to whom no credit was actually given, and who had retired before the transaction took place.

1516. The extent of the power of a partner to *renew* contracts which existed at the time of dissolution seems not to be perfectly settled ; in some states much liberality has been exercised to extend the power, in others it has been much restricted.(b)

1517. The same observation may be made with

(a) Story on Partn. § 159 ; *Evans v. Drummond*, 4 Esp. 80 ; *Newmarch v. Clay*, 14 East, 239 ; *Magill v. Merrie*, 5 B. Munr. 168.

(b) In Pennsylvania it has been held that although a partnership has been dissolved, it is still subsisting for many purposes. *Fareira v. Seyres*, 5 W. & S. 210. That, therefore, a liquidating partner may renew a note drawn by the firm, and even borrow money on its credit to pay the debts in order to prevent a sacrifice of its effects. *Estate of Davis & Desauque*, 5 Whart. 536 ; *Houser v. Irvine*, 3 Watts & Serg. 347 ; *Mason v. Wickersham*, 4 Watts & Serg. 101 ; *Dundas v. Gallagher*, 4 Penn. St. R. 210. See *Robinson v. Taylor*, 4 Penn. St. R. 242. In the following cases the right of a partner to renew the notes of the firm is denied : *National Bank v. Norton*, 1 Hill, 572 ; *Galliot v. Planters and Mechanics' Bank*, 1 McMullan, 209 ; *Perrin v. Keene*, 1 App. 355 ; *Rootes v. Welford*, 4 Munf. 215.

regard to *admissions* of one partner so as to take a debt out of the acts of limitations; in some states such admissions after a dissolution have no effect in rendering liable the other partners upon debts which are barred,<sup>(a)</sup> while in others, such acknowledgment of a partnership debt, is sufficient to take it out of the statute.<sup>(b)</sup>

2. *What assets are liable for the payment of partnership debts.*

1518. As the partnership is a species of moral being, entitled to, or liable on all contracts it may make, and owning property separate and distinct from that of the several partners, it follows that it is liable, and all its assets must be applied, to the discharge of its social obligations, before any part can be taken to pay the debts of the separate partners, or to reimburse any of them for advances which they may have made.

While all the partners are living and solvent, no creditor can enforce the payment of his claim against the joint effects or the separate property of the partners, except by a common action at law. But when the dissolution takes place by the death or bankruptcy of one partner, then the rights of the creditors attach, and the joint creditors are entitled to be paid out of the assets of the partnership, before the separate creditors of the insolvent or deceased partners. The reason for this is manifest; the separate creditors of one partner can pretend to no greater right than he had himself; and, as he can have no claim to the assets of the firm, until all the debts of the partnership have been satisfied, they cannot claim to be paid out

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(a) *Levy v. Cadet*, 17 S. & R. 126; *Yandes v. Lefavour*, 2 Blackf. 371; *Ward v. Howell*, 5 Harr. & John. 60; *Shelton v. Cocke*, 3 Munf. 191; *Wilson v. Torbet*, 3 Stew. 296; *Hackley v. Hastie*, 3 John. 536; *Gleason v. Clark*, 9 Cowen, 57; *Brady v. Hill*, 1 Mis. 315; *White v. Union Ins. Co.*, 1 N. & M. 556; *Tassey v. Church*, 4 Watts & Serg. 141; *Story on Partn.* § 323, 324.

(b) *Neal v. Hassan*, 3 McCord, 278; *Greenleaf v. Quincy*, 3 Fairf. 11.

of the assets of the firm until all its debts have been paid.

When a partner dies, his personal representatives are not liable at law to the creditors of the partnership, their remedy then is against the surviving partners,<sup>(a)</sup> but they are liable in equity. In equity the partnership debts are held to be *joint and several*, and consequently the joint creditors have in all cases a right to proceed at law against the survivors, and an election also to proceed in equity against the estate of the deceased partner, whether the survivors be insolvent, bankrupt, or not.<sup>(b)</sup>

The case we have just considered is one where the separate estate was *solvent*; the case where both the partnership and the separate estate are *insolvent* presents another question, and the inquiry then is whether the debts are to be paid *pari passu* out of the estate of the deceased, or whether either is entitled to a preference. As a general rule, it may perhaps be stated that the joint creditors have a priority of right to payment out of the joint estate, and the separate creditors have a similar right over the private estate; and the surplus is divisible among the other class of creditors;<sup>(c)</sup> but this rule seems to conflict with the principle adopted in equity, that all the debts due by a partnership are joint and several.<sup>(d)</sup>

1519. The next object of our inquiries is to ascertain *what is joint and what is separate property*.

The *joint* estate of a partnership is that which belongs to the firm, and in which the partners have a

(a) Bac. Ab. Obligation, D. 4; Com. Dig. Abatement, F. 8. In Pennsylvania a suit may be maintained against the executors of a deceased partner, the declaration averring the insolvency of the surviving partner. *Welsh v. Speakman*, 8 Watts & Serg. 257.

(b) *Wilkinson v. Henderson*, 1 Mylne & Keen, 582; *Devaynes v. Noble*, 1 Mer. 529, 563.

(c) *Murray v. Murray*, 5 John. Ch. 60; *Bell v. Newman*, 5 S. & R. 78; *Allen v. Wells*, 22 Pick. 450.

(d) See Story on Partn. § 363; 3 Kent. Com. 65.

joint interest either at law or in equity, at the time of dissolution. The *separate* estate is that in which some of the partners, less than the whole number, have a separate interest, either at law or in equity, at the same period.

The separate estate may have belonged to the partnership, and been *transferred* to one of the partners before the dissolution; in such case, or where separate property has been so turned into joint property, *bond fide*, the estate will be considered joint or several, as it may have been so agreed; but in such case the title to the property must have been so transferred.(a)

The fact that separate property was actually *possessed and used* by the partnership, for partnership purposes, at the time of dissolution, if it was merely for the accommodation of the partnership, does not change the property, nor affect the rights of the separate partners.(b)

When forming the partnership it may be agreed what *character* property shall possess at the time of the dissolution, whether joint or separate, and such agreement will be binding upon the partners; the property will possess, at the time of the dissolution, that character which was agreed it should then possess.(c)

*Art. 2.—Of the effects of the dissolution upon the partners.*

1520. This article will be divided into three parts or subdivisions: 1, of the settlement of the affairs of the firm; 2, of the debts and credits of each partner toward the partnership; 3, of the division of the assets.

*1. Of the settlement of the affairs of the partnership.*

1521. There never was a partnership of any considerable extent, whose affairs were so perfectly settled

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(a) Collyer on Partn. B. 4, c. 2, s. 1.

(b) Ibid.

(c) Ibid.

every day, that at the moment of its dissolution, all that was due to it and all it owed were precisely settled and ascertained, and where no dispute was likely to arise, proofs to be made, and accounts to be stated. To effect this there must be power somewhere to make a *liquidation*, a word perfectly understood in commerce. Although the dissolution so far destroys the authority of the several partners, that they cannot enter into new contracts in the name of the firm, and, if they do, they may be held responsible for all consequences, yet, for the purposes of winding up the business of the partnership they must possess all the requisite powers.(a)

1522. It is not unusual, upon the dissolution of a partnership, for the partners to agree upon some one of the partners to liquidate the affairs of the firm; it sometimes occurs also, that by the articles of partnership, one of the partners is appointed to settle the joint affairs upon a dissolution.

But if no such provision or agreement has been entered into, all the partners have an equal right to receive debts, settle accounts, and do other acts to wind up the affairs of the firm; and if any one should misapply the assets, or abuse the power conferred on him, he may be restrained by a court of equity, by injunction.(b)

1523. It sometimes happens that partners cannot agree as to who shall collect the assets or settle and wind up the social affairs; in such cases, if there has been any abuse, or any serious injury is likely to happen, a court of equity will appoint a *receiver*, who will be authorized to collect, and, under the direction of the court, sell and dispose of the partnership property, and turn it all into cash. His accounts are afterward settled, and the money in his hands is divided, by order

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(a) Gow on Partn. c. 5, s. 2; *Crawshay v. Collins*, 15 Ves. 226.

(b) Story on Partn. § 329.



of the court, among such persons as are entitled to it, whether creditors or partners, in just proportions.

1524. When the partnership is dissolved by the death of one of the partners, the survivor or survivors are entitled to wind up the business of the firm, and the personal representatives of the deceased cannot interfere. In case of gross abuse of this power, or where serious injury is likely to accrue, the settlement may be taken out of the hands of the survivors, and placed in the hands of a receiver.(a)

1525. When one of the partners has been appointed to settle the affairs of the firm, he is generally invested with the same powers, as far as the settlement with third persons extends, as he possessed before the dissolution, for those powers being requisite for the settlement of the affairs, it is presumed they have not been annulled by the dissolution; he represents all the partners, and, in the absence of all fraud, his acts are binding upon them.

1526. The expenses of the liquidation, and of winding up the business, are to be borne by the assets of the firm; but no partner is allowed any compensation for his trouble and services, in assisting in the arrangement and winding up of the business of the firm, unless a stipulation to the contrary has been made;(b) and if any advantageous settlement be made by him, the benefit shall accrue to all the members of the late firm.(c)

1527. A receiver appointed by a court of equity, by assuming the duty, becomes a mandatary, and he is bound to use due diligence in the exercise of his appointment. He is generally required to give security for the faithful performance of his duties; and probably both himself and his sureties would be held

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(a) Collyer on Partn. B. 1, c. 2, s. 3.

(b) Wittle v. Farlane, 1 Knapp, 312; Heathcote v. Hulme, 1 Jac. & Walk. 122.

(c) Collyer on Partn. B. 2, c. 2, s. 1; Story, Eq. Jur. § 316.

responsible for his neglect; as, if having received a note belonging to the partnership, on which was a good indorser, he should neglect to present it, and cause it to be protested for non-payment, by which the money was lost, he would be chargeable with the amount.

As in the case of the settlement made by a partner, the expenses attending the winding up of the business must be borne by the social assets; and he will be entitled to a just compensation for his services.

*2. Of the settlement between each of the partners and the firm.*

1528. After having collected the whole of the assets of the partnership, and paid the debts due by the firm, the next operation is to settle the amounts between each of the partners and the partnership, before a division can take place among them.

Before attempting to do this, the accounts of the liquidating partner, since the dissolution of the partnership, ought to be first settled. He ought to produce his books and vouchers where they can be reasonably expected, for all the sums received and paid, but, in such cases, it is usual to make a liberal settlement, and to admit charges which have the appearance of having been properly made of disbursements; as, for example, expenses of travelling on account of the partnership.

The books of the firm ought to show the true state of the partners' separate accounts, and each partner is required to keep an account of his own transaction with the partnership always ready for inspection.<sup>(a)</sup>

Upon the settlement, each partner becomes chargeable with all the debts and obligations which he owes to the partnership, and interest upon them; and with all the profits which he has made out of the partnership effects during the partnership, or since the dissolution, whether the same has been made rightfully or

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(a) Collyer on Partn. B. 2, c. 2, s. 1; Rowe v. Wood, 2 Jac. & Walk. 553; Goodman v. Whitcomb, 1 Jac. & Walk. 569.

by misapplication, or unlawful use of the funds or property of the firm.(a) He is chargeable also with interest on the amount of capital which he bound himself to furnish and which he did not. In all cases of advances received from the firm, he is chargeable with the amount and interest.

1529. On the other hand, he is entitled to a credit for all advances he has made to the firm, and for all interest on such sums. He has also a right to be credited for all sums he has expended for the firm, or which he has been subject to pay, necessarily, while he was transacting the affairs of the partnership. Take, for example, a case put by Pardessus: a partner while engaged in the business of the firm, on a journey, is robbed, and a number of articles are taken from him which were his own property, and which were proper and necessary for him to have on his journey; he is entitled to a credit with the firm for their value, the loss being a necessary consequence of the business of the partnership and a fair charge against it.

1530. When there has been a positive stipulation between the partners as to the manner in which an account should be stated, that mode must of course be adopted, unless the partners by their own acts or conduct have abandoned it. In the absence of all agreements, if the parties cannot adopt some plan of settlement, a court of equity, in settling the accounts between the partners, will take the accounts which have been settled between the parties to be correct, unless some errors are pointed out, which will then be corrected; and cause an account to be stated from that time. If there has been no account stated, or any express or implied settlement, then the accounts must be stated from the commencement of the partnership. If, in case of the death of a partner, the survivors

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(a) Droit Com. n. 1078.

have employed the capital, without authority, the profits which they have made will be considered as capital, and as joint property, subject to all just deductions.(a)

3. *Of the division of the surplus effects of the firm among the partners.*

1531. This head will be made the subject of two others: 1, of the things to be divided; 2, of the manner of making the division.

1° *Of the things which are to be divided.*

1532. The division cannot be made until after a liquidation has taken place, and the rights of the respective partners have been ascertained. For this purpose all the profits which have been made by a partner, whether openly in the general transaction of the social business, or in a clandestine manner, contrary to his duty as a partner, by carrying on the same or another trade for his private advantage, and in a manner injurious to the interest of the partnership, must be brought into the assets of the firm;(b) for when the profits arise from the capital or labor belonging to all the partners, they must be divided amongst them all.

The assets are composed of every thing which belong to the partnership, whether the property be real or personal, and whether it consists of choses in possession or choses in action. The partners have a right to insist that all the property shall be turned into money. But it not unfrequently happens that such articles as have not been sold or disposed of are divided among them.

Choses in action, which are classified into *good*, *doubtful*, and *bad*, are also sometimes divided equitably among partners.

(a) *Willett v. Blanford*, 1 Hare, 253 : *Collyer on Partn. B. 2, c. 3, s. 4.*

(b) *Waring v. Cram*, 1 Pars. Sel. Cas. 516, 523.

With regard to the *trade marks* and *good will* of the establishment; the right to use the one or enjoy the other, is generally allotted to one of the partners; but they must be sold if insisted on. (a) If nothing has been agreed upon in relation to trade marks, it seems but reasonable that those who continue the business may use them, provided the use of them shall not be injurious to the other partners, by making it known by proper advertisements that they no longer designate the same establishment.

2° *Of the manner of making the division.*

1533. In the division of the property, which we will suppose has all been reduced to cash, in the first place, each of the partners is to be returned such advances as he has made to the firm. The remainder of the assets are divided in proportion to the amount of the capital stock which each partner has furnished, unless there has been a different mode of division agreed upon by the articles of agreement. In that case the division must be made as agreed upon.

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TITLE VI.—OF TITLE TO PERSONAL PROPERTY BY  
OPERATION OF LAW.

1534. Having examined the law by which title is vested in property by original occupancy; by acts of war; and by contract, or the acts of the parties; it will be proper now to consider how title is vested in property by operation of law. This may be by marriage, by intestacy, by forfeiture, by judgment, and by bankruptcy or insolvency.

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(a) *Holden's adm. v. McMakin*, Pars. Sel. Cas. 270.

CHAPTER I.—OF TITLE TO PROPERTY VESTED BY  
MARRIAGE.(a)

1535. By the common law, the husband becomes liable for the debts of the wife, and they may be recovered by a joint action against him and his wife during the coverture. To balance this liability the law vests in him, by the marriage, all the personal chattels, which were in her possession at the time of the marriage, and her other personal property *sub modo*. He is also entitled to certain rights in her real estate, which will be considered in another place.

SECTION 1.—OF THE HUSBAND'S TITLE TO THE WIFE'S  
CHATELS IN POSSESSION.

1536. A distinction is made between her chattels personal and her chattels real.

## § 1.—Husband's right to the wife's chattels personal.

1537. All the wife's *chattels personal* in possession vest immediately in the husband. Money, furniture, and the very setting out the wife has received from her father, belong to the husband, immediately on the marriage; but from this general rule must be excepted the wife's clothing and paraphernalia suitable to her station in life; and though he might, in his lifetime, give away or sell her jewels and ornaments, yet, if he dies without having disposed of them, they will belong to her after his death, for he cannot bequeath them by his will.(b)

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(a) By the civil law, the property of the husband and wife is held in a kind of community or partnership, so that the wife's share cannot be disposed of by the husband, nor sold for his debts. In Louisiana, the rights of the husband and wife are regulated by the Code, B. 3, t. 6.

(b) In some of the states statutes have been made, wisely securing to the wife her property, under certain conditions.

§ 2.—Of the husband's rights to the wife's chattels real.

1538. A *chattel real* vests in the husband, not absolutely, but *sub modo*; as in the case of a lease for years, the husband is entitled to receive the rents and profits of it, and may, if he pleases, sell, surrender, or dispose of it during the coverture, and it is liable to be taken in execution for his debts; if he survives her, it becomes immediately his own.

But in case the wife survives him, and such chattels remain undisposed of by the husband, so that the property has not been changed, the right to it survives to the wife, for as before observed, he cannot bequeath it by his will.(a)

SECTION 2.—OF THE HUSBAND'S RIGHT TO THE WIFE'S CHOSSES IN ACTION.

1539. At common law the husband is entitled to the wife's *choses in action*, and he may reduce them to possession or sell them, and then they become his absolutely. But if, in his lifetime, he does not so dispose of them, at his death they survive to the wife, and she takes them in her own original right, without administering to the estate of her husband, and they will not be liable for his debts.(b) On the death of the wife, her *choses in action* do not, strictly speaking, survive to the husband, but he may recover them as her administrator, and after paying her debts, *dum sola*, for which her assets will be responsible, though as husband, he will then be no longer liable for them, they will belong to him. This right is given to him by the English statute of 22 and 23 C. II., commonly called the statute of distributions, and the statute

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(a) Co. Litt. 351 a.

(b) Co. Litt. 351; 2 Bl. Com. 434.

of 29 C. II., c. 3, s. 25, the provisions of which statutes have been reenacted in most of the United States.(a)

1540. Questions frequently arise as to the right by which the husband takes; as to what is a sufficient transfer of a *chose in action* to deprive the wife of her right as survivor, and to what equity the wife is entitled in her *choses in action*. These will be separately examined.

§ 1.—By what capacity the husband takes.

1541. The husband cannot take under the statute of distribution as *next of kin* to his wife, for they do not bear that relation to each other;(b) he takes under the character of *husband*.

§ 2.—What is a sufficient transfer or conversion of such choses in action by the husband.

1542. By collecting money due on a bond, or note, or other *chose in action*, the husband appropriates it to his own use, and by that conversion makes it his own, unless, indeed, he manifests an intention to preserve it for his wife.(c)

An actual sale of the *chose in action*, will transfer it to the purchaser divested of the wife's right; but a general assignment in bankruptcy, or under insolvent laws, will not pass her property or right of survivorship, and if the husband die before the assignees

(a) *Biggest v. Biggest*, 7 Watts, 563; *Hoskins v. Miller*, 2 Dav. 360; *Whitaker v. Whitaker*, 6 John. 112.

(b) *Watt v. Watt*, 3 Ves. 246; *Garrick v. Camden*, 14 Ves. 381; *Anderson v. Dawson*, 15 Ves. 537; *Bailey v. Wright*, 18 Ves. 49, 55.

(c) It was held in Pennsylvania, that taking possession is not in all cases conclusive, though it may be considered as *prima facie* evidence of conversion. On proof being made that he held the money as her trustee, his estate would be liable. *Estate of Hinds*, 5 Whart. 138. See *Stanwood v. Stanwood*, 17 Mass. 57; *Marston v. Carter*, 12 N. Hamp. 159; *Phelps v. Phelps*, 20 Pick. 556; *In Re Gray's Estate*, 1 Penn. St. R. 327; *Timbers v. Katz*, 6 Watts & Serg. 290.



reduce it to possession, it will survive to her.(a) Nor will an assignment by the husband of the wife's *chose in action* as a collateral security, deprive her of her right of survivorship.(b)

Obtaining a judgment in his own name, for the purpose of recovering such *chose in action*, will deprive the wife of her survivorship, but if the judgment be in favor of the husband and wife jointly, her right survives.(c)

To deprive the wife of the right of survivorship, the conversion must be made by the husband as such, and not in a representative capacity.(d)

§ 3.—Of the wife's equity.

1543. When the husband is compelled to go into chancery in order to recover a *chose in action*, before he will be permitted to recover, he will be required to make a reasonable provision out of it for the maintenance of his wife and children, on the ground that he who asks equity must do equity. It matters not, therefore, whether the suit for the wife's debt, legacy or portion be instituted by the husband himself, or by his assignees, in either case, a just settlement on the wife must first be made of a portion of the property; and this provision is not to be proportioned merely to that part of the wife's equitable right that the complainant seeks to recover, but to the whole of her personal fortune, including what the husband had previously received.(e)

(a) This is the general rule, though in Pennsylvania, owing to the force of certain expressions in the act of Assembly, the *choses in action* of the wife pass to the assignees of an insolvent, not subject to her right of survivorship. *Richwine v. Heim*, 1 Pennsylv. 373.

(b) *Hartman v. Dowdel*, 1 Rawle, 279.

(c) *Oglander v. Baston*, 1 Vern. 396; *Stewart's Appeal*, 3 Watts & Serg. 476.

(d) *Estate of Kintzinger*, 2 Ashm. 455; *Mayfield v. Clifton*, 3 Stew. 375.

(e) *Dearing v. Fitzpatrick*, 1 Meigs, 551; *Kenny v. Udal*, 5 John. Ch. 464; 1 Beav. 593; *Howard v. Moffat*, 2 John. Ch. 206; *Dumond v. Magee*, 4 John. Ch. 318; *Duval v. Farmers' Bank*, 1 Gill & John. 282; *Durr v. Browyer*, 2 McCord's Ch. R. 368. See *Rees v. Waters*, 9 Watts, 90.

The right of a wife to have a provision made for her, is called the *wife's equity*,<sup>(a)</sup>

## CHAPTER II.—OF TITLE TO PERSONAL PROPERTY BY INTESTACY.

1544. When a man dies without a will, he is said to die *intestate*, and the state or condition of his estate is an *intestacy*. The real estate of which he was seised, at the time of his death, passes by operation of law to his heirs by descent, and his personal property becomes vested in any one who may be lawfully appointed his *administrator*, to manage his estate in his place, distribute it according to law, and to represent the intestate. The administrator does not receive the personal property for his own use, he is a mere trustee to administer it for the purpose of paying the intestate's debts, and distributing the surplus, after paying the just expenses of his administration, to the *next of kin* of the intestate.

1545. By the term *next of kin* is meant the relations of a party who died intestate. In general no one comes within the term who is not included within the provisions of the statute of distribution. A wife cannot claim as next of kin to her husband, nor a husband as next of kin to his wife; and, under the intestate laws, this is perhaps always the case.<sup>(b)</sup>

1546. To understand this subject, we must ascertain, 1, who may be appointed an administrator, and by whom he is to be appointed; 2, the several kinds of administrators and their various powers.

### SECTION 1.—OF THE APPOINTMENT OF AN ADMINISTRATOR.

1547. When the rights of men were but little

(a) Shelf on Mar. & Div. 605; Bouv. L. D. h. t.

(b) Where property is given by will to the *next of kin*, it may, owing to circumstances, be construed so as to include husband or wife under this designation. How. on Fr. 288, 289; 1 My. & Keen, 82.

understood in England, the king, and afterward the clergy, seized upon all vacant estates, and so much abuse prevailed, that but little of what a man left at his death benefited his family. The clergy, with their usual avidity, seized the goods of the intestate, and were allowed to give, alien, or sell them, at their will, and dispose of the money in *pious usus*; and, as the reverend prelates were not accountable to any but God and themselves for their conduct,(a) it is not surprising that so much abuse prevailed.

In the United States, happily, the clergy have no jurisdiction in cases of this kind. The power to grant administration is vested in certain public officers, known in the several states by different names, such as judge of probate, ordinary, register of wills and for granting administrations, surrogates, orphans' courts, and other names expressive of their authority.

The provisions of the acts of each state point out the persons who are to be appointed, and the order in which they are to be chosen, leaving, in general, a discretion with the appointing officer in the selection of individuals out of classes.

#### SECTION 2.—OF THE SEVERAL KINDS OF ADMINISTRATORS.

1548. Administrators are of several kinds, each having powers, and being bound by obligations, different from each other; it will be requisite, therefore, to examine them separately. Administrators are general, or those who have a right to administer the whole estate of the deceased; or special, that is, those who administer it but partially, or but for a limited time.

##### § 1.—Of general administrators.

1549. These are of two kinds: those appointed to administer the estate of a man who died intestate,

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(a) Plowd. 277; 2 Bl. Com. 495.

and those who administer the estate of a man who made a will.

*Art. 1.—Of the general administrator of an intestate estate.*

1550. When a man dies without having made a will, the most usual administration granted on his estate, is to authorize the administrator to manage the whole estate for as long a time as may be requisite to make a final settlement; so that his power is unlimited as to time or as it regards the estate.

By the grant of letters of administration to such an administrator, he is invested with full and ample power to take possession of all the personal estate of the deceased, and to make an inventory of the same, which he is required to file with an officer appointed by law; to give such surety as is required by the statute, and to sell all such personal property as may come to his hands; to collect all the debts he can which were due to the intestate at the time of his death, and to represent him in all things which relate to his chattels real or personal.

The statutes of distribution in the several states are copied with certain modifications from the English statute 22 and 23 Car. II., c. 10, which was itself borrowed from the 118 Novel of Justinian. It is not within the plan of this work to state in detail the provisions of the acts of the legislature of each state.(a)

A question of very general importance frequently arises, as to the law which is to govern in the distribution of personal property, whether such property be given by will, or whether it be transmitted by intestacy or succession, when it is found in different states or countries. A general rule has been adopted that personal property, wherever situated, shall be distributed

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(a) See Kent, Com. Lect. 37.

according to the law of the testator or intestate's domicile at the time of his death, and not by the conflicting laws of the states where the goods happened to be. (a) Real estate is governed by the law of the place where it is situated.

*Art. 2.—Of the general administrator cum testamento annexo.*

1551. Administration *cum testamento annexo* is granted when the deceased has made a will, and either has not appointed any executor, or those appointed have refused to serve, or are dead, or otherwise incapable to execute the will; the officer authorized to grant letters of administration, commits administration to those who have the most interest in husbanding the assets; a residuary legatee is preferred.

The administrator is bound to collect the debts and perform the duties generally of a general administrator, and in the distribution of the assets he is governed by the will, a copy of which is annexed to the letters of administration.

§ 2.—Of special administrators.

1552. Special administrators are of two kinds: first, those who are appointed, whose authority is confined to a part of the estate; and, secondly, those whose authority is limited as to time.

*Art. 1.—Of administrators with limited authority over the estate.*

1553. These are of two kinds.

1. When an administrator has been appointed, and, after having administered a part of the estate, dies, leaving a part of the estate not administered, or

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(a) Story, Confli. of Laws, c. 11; Desesbats v. Berquiers, 1 Binn. 336; Dixon's Executors v. Ramsay's Executors, 3 Cranch, 319; United States v. Crosby, 7 Cranch, 115; Kerr v. Moon, 9 Wheat. 365; Harvey v. Richards, 1 Mason, 381; Holmes v. Ramsen, 4 John. Ch. 460.

where there are debts remaining unpaid, (a) an administrator is appointed to administer the remainder of the estate. He is called an administrator *de bonis non*. He has all the power of a common or general administrator with regard to the estate committed to his charge. (b)

1554.—2. When an executor is appointed by will, and, after having administered a part of the estate, dies, or otherwise becomes incapable, or is removed, an administrator is appointed to administer the remainder of the estate; as this administrator must administer the estate so as to carry out the will of the testator, the will is attached to his administration, and he is therefore called an administrator *de bonis non, cum testamento annexo*. (c)

*Art. 2.—Of administrators with limited authority as to time.*

1555. There are three kinds of administrators with limited authority as to time. 1. When the executor named in a will is an infant, and has not legal capacity to execute the will, the interests of the estate require that some one should be authorized to attend to them; for this purpose an administrator is appointed, whose authority is to continue until the executor shall attain the age required by law, which at common law is seventeen years, but by statutory provisions in several states, is fixed at twenty-one years. (d) He is called an administrator *durante minore etate*. His powers extend to administer the estate so far as to collect the same, sell a sufficiency of the personal property to pay the debts, sell *bona peritura*, or such perishable goods as belong to the estate, and perform such other acts

(a) *Brattle v. Converse*, 1 Root, 174; *Chapin v. Hastings*, 2 Pick. 361.

(b) *Bac. Ab. Executors*, B. 1.

(c) *Com. Dig. Administrator*, B. 1.

(d) See *Godolph. Orp. Leg* 102; 5 Co. 29.

as require immediate attention. He may sue and be sued.(a)

1556.—2. When an executor has been appointed to execute a will, and at the time of the testator's death he is absent, the estate in the meantime requiring to be attended to, an administrator *durante absentia*, is appointed. The powers of this administrator continue until the return of the executor, and then they cease upon the probate of the will by the executor.(b) If the executor should die abroad, the powers of the administrator *durante absentia*, it seems, would not cease by that event.(c)

1557.—3. An administrator *pendente lite* is one to whom administration is granted pending the controversy respecting an alleged will. Such administration has been granted pending a contest as to who is by law entitled to administration.(d) This administrator is merely an officer of the court, and holds the property till the suit terminates; he can make no distribution, though he may bring suits.(e)

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#### CHAPTER III.—OF TITLE TO PERSONAL PROPERTY BY FORFEITURE.

1558. *Forfeiture*, applied to lands as well as to goods, is a punishment annexed by law to some illegal act, or negligence in the owner of lands, tenements or hereditaments, whereby he loses his interest therein, and they go to the party injured as a recompense for the wrong which he alone, or the public together with him, has sustained.(f)

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(a) Bac. Ab. Executors, B. 1; Roll. Ab. 110; Cro. Eliz. 718.

(b) In the Goods of Cassidy, 4 Hagg. Eccl. Rep. 360.

(c) Taynton v. Hannay, 3 Bos. & Pull. 26.

(d) Walker v. Woollaston, 2 P. Wms. 589; 2 Cas. temp. Lee, 258.

(e) Knight v. Duplessis, 1 Ves. sen. 325.

(f) 2 Bl. Com. 267.

When we come to consider the transfer of real estate, we will examine the law as to forfeiture of land; now our observations will be confined to the forfeiture of goods.

By the constitution of the United States, (a) it is declared that no attainder of treason shall work corruption of blood, or forfeiture, except within the life of the person attainted. And by the act of congress of April 30, 1790, s. 24, (b) it is enacted, that no conviction or judgment for any of the offences aforesaid, shall work corruption of blood, or forfeiture of estate. As the offences punished by this act are of the blackest dye, including cases of treason, the punishment of forfeiture for crimes unconnected with property, may be considered as abolished by the general government. The forfeiture of estates for such crimes is very much reduced in practice in this country, and when it occurs, the state takes the title the party had and no more: (c)

In general, forfeiture for crimes is abolished in the several states, though perhaps the punishment exists in some of them, and in one of them the power is limited to the cases of treason and murder. (d)

1559. But forfeitures often take place, where a legislative act declares that the performance of a certain action, or the omission to perform what it commands, shall be followed by the forfeiture of a thing. The revenue laws of the United States furnish abundant examples of this kind. It may be stated as a general rule, that the title to the thing forfeited does not vest in the party to whom it is given, without a judicial proceeding declaring the forfeiture, and without hearing the party to whom the goods and chattels belong. (e)

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(a) Art. 3, s. 3.

(b) 1 Story's Laws U. S. 88.

(c) 1 Mason, 174.

(d) Const. of Maryland.

(e) Fire Department v. Kip, 10 Wend. 266.



## CHAPTER IV.—OF TITLE TO PERSONAL PROPERTY BY JUDGMENT.

1560. The fourth manner of acquiring title by operation of law, is by *judgment*. A judgment is a decision or sentence of the law, given by a court of justice or other competent tribunal, as the result of proceedings instituted therein, for the redress of an injury. It is not every judgment however that vests in the successful plaintiff any property. In some cases the judgment is, that the plaintiff shall recover the *possession* only, while in others he recovers the *property*. When he recovers the property, it is evident that the title to it is changed; but when he recovers the possession, the title being in him before recovery, is not changed by operation of the judgment.

When the plaintiff sues in trover or trespass, and he recovers the value of a specific chattel, of which the possession had been acquired by the defendant by a wrongful act, the title of the goods is altered by the recovery, *(a)* and it becomes vested in the defendant. But, according to some authorities, the title to the property is not fully vested until the defendant has made satisfaction. *(b)*

1561. In some cases a man has no right until the commencement of the action, and the rendition of the judgment gives him the title. Such, for instance, is an action upon a penal statute, which gives the right of action to any one who will sue for the violation of the statute. In this kind of popular action, he who, in good faith, brings the first suit, will be entitled to

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*(a)* Rogers v. Moore, 1 Rice, 60; Robertson v. Montgomery, 1 Rice, 87; Chartran v. Smith, 1 Rice, 229; Floyd v. Brown, 121; Marsh v. Pier, 4 Rawle, 273; Cook v. Cook, 2 Brev. 349; Morrell v. Johnson, 1 Hen. & Munf. 449.

*(b)* Osterhout v. Roberts, 8 Cowen, 43; Jones v. McNeil, 2 Bail. 466; Hopkins v. Hersey, 7 Shepl. 449.

recover, and the judgment will vest in him a right to recover the amount for which it is given in his favor.

When a man has sustained an injury either in his property, his person, or his relative rights, as trespass, assault and battery, slander, or criminal conversation with plaintiff's wife, he acquires a right to sue for the recovery of a compensation which the law awards him in damages. The amount of such damages is ascertained by the verdict of a jury, and the right to them is fixed by the judgment of the court. Costs, which are given by statute, may be assimilated to damages received for a tort.

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CHAPTER V.—OF TITLE TO PERSONAL PROPERTY BY BANKRUPTCY AND INSOLVENCY.

1562. A fifth mode of acquiring title to personal property is by bankruptcy and insolvency.

SECTION 1.—OF BANKRUPTCY.

1563. The constitution of the United States,<sup>(a)</sup> authorizes congress to "establish uniform laws on the subject of bankruptcies throughout the United States." Congress exercised this power by the passage of the act of April 4, 1800, by which a uniform system of bankruptcy throughout the United States was established; this act was repealed on the 19th of December, 1803, before the time had elapsed which was limited for its existence. On the 19th day of August, 1841, congress passed a second bankrupt law, which was repealed by the act of March 3, 1843. At present there is no national bankrupt law in force.

It must be observed that there is a very great

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(a) Art. 1, s. 8.

distinction between a bankrupt and insolvent. A *bankrupt* is a person who has done, or suffered to be done, some act which the law declares to be an *act of bankruptcy*. In such case, upon proper proceedings, he may be declared a bankrupt.

A man may be a bankrupt, and yet be perfectly solvent; or he may be insolvent, and, in consequence of not having done or suffered an act of bankruptcy, he may not be a bankrupt. Again, the bankrupt laws are intended mainly to secure creditors from waste, extravagance and mismanagement, by seizing the property in the hands of the debtors, and placing it in the custody of the law; whereas the insolvent laws only relieve a man from imprisonment for debt after he has assigned his property for the benefit of his creditors.

Both under the bankrupt and insolvent laws, the debtor is required to surrender his property for the benefit of his creditors. Bankrupt laws discharge the person of the debtor from imprisonment, and his property, acquired after his discharge, from all liabilities for his debts; insolvent laws simply discharge the debtor from imprisonment, or liability to be imprisoned, but his after-acquired property may be taken in satisfaction for his former debts.(a)

The states may severally pass bankrupt laws, but no such law can be permitted to impair the obligation of contracts; nor can the states, severally, pass any bankrupt law conflicting with any act which congress may pass on the subject;(b) nor can the bankrupt laws of one state affect the citizens of another state.(c)

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(a) See 2 Bell's Comm. 162, 5th ed. This may be said to be the general operation of such laws, yet a law might be made by congress which must be considered a bankrupt law, although it might not discharge the after-acquired property of the debtor. See Story on the Const. § 1106.

(b) *Sturgis v. Crowninshield*, 4 Wheat. 122.

(c) *Ogden v. Saunders*, 12 Wheat. 213.

## SECTION 2.—OF INSOLVENCY.

1564. By *insolvency* is meant the state or condition of a person who is insolvent. The word *insolvent*, itself, has several meanings. It signifies a person who is not able to pay his debts.(a) A person is also said to be insolvent, who is under a present inability to answer, in the ordinary course of business, the responsibility which his creditors may enforce, by course of legal measures, without reference to his estate proving sufficient to pay all his debts, when ultimately wound up.(b)

It has been the wise policy of all polished nations to free the person of the debtor, upon his doing what justice requires, namely, surrendering all his property for the benefit of his creditors. The several states of the Union have passed laws which have this effect, and all they require in general is, that the debtor shall make a full surrender.

Their effect does not generally extend beyond the territory where they were enacted, unless the creditor has made himself a party to the proceedings under the law.(c) It operates upon contracts made within the state, between its own citizens, or suitors who have become subject to the authority of the state. As a general rule, the discharge under the bankrupt law of one country, does not affect contracts made to be executed in another.(d)

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(a) Civil Code of Louis. art. 1980.

(b) See Bayley v. Schofield, 1 M. & Selw. 338.

(c) 4 Wheat. 122; 12 Wheat. 213; Woodhull v. Wagner, 1 Bald. 296; Pugh v. Bussell, 2 Blackf. 394; Clay v. Smith, 3 Peters, 411.

(d) 12 Wheat. 213; Le Roy v. Crowninshield, 2 Mason, 161.

## TITLE VII.—OF TITLE TO PROPERTY BY TESTAMENT.

1565. The form of wills or testaments which bequeath personal estate, and those which devise real property, and many of the rules which govern in the construction of wills, being the same, the consideration of wills and testaments will be postponed until we come to inquire into the manner that title to real estate may be gained and lost.<sup>(a)</sup>

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## PART III.—OF REAL PROPERTY.

1566. It is not within the plan of this work to enter into speculative theories, as to the foundation of the right which society has to the soil, nor to inquire whether the title of the aborigines has been extinguished according to justice and equity. It is sufficient that we find ourselves in possession of the fair portion of America, known as the United States, and that we hold it by virtue of law binding on all who have an interest in it. Such speculative views and theories are, at best, only calculated to gratify curiosity, or to justify acts which, in some instances, have a very doubtful morality for their basis.

On entering into the inquiry of the law relating to real estate, it will be perceived that the rules which govern this kind of property are, in general, arbitrary, technical and artificial. One of the principal reasons for this, is the fact that they were established during an age when the rights of the weak became an easy prey to the rapacity of the powerful; and when too often a technical reason or an artificial rule supplied the place of justice.

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(a) Post, B. 2, part 2, tit. 3, ch. 8.

In the United States, the right to property is secured by the constitution, so that it cannot be taken either for public or private use, except in conformity to law. The government cannot deprive the weakest individual of his property, even for public purposes, although it still retains the right of eminent domain over it, without making a just compensation to the owner.

During the middle ages there existed on the continent of Europe, and in England, from which latter country we have derived many of the rules which govern real property, a political system which placed men and estates into hierarchical and multiplied distinctions of lords and vassals. The laws which supported this system were called *feudal laws*.<sup>(a)</sup>

These laws vested all the lands in the country in the sovereign. The chief parcelled them out among the great men of the nation to be held of him, so that the king had the *dominium directum*; and the grantee or vassal had what was called the *dominium utile*. It was a maxim *nulle terre sans seigneur*. These tenants were bound to do services to the king, generally of a military character. These great lords, in their turn, granted part of the lands they thus acquired to other inferior vassals, who held under them, and were bound to perform services to these inferior lords, who were called *mesne* lords, to distinguish them from the king, who was called the lord *paramount*.

The *mesne* lords merely *held* the land of the lord paramount by certain terms of tenure, but did not own the land, it being vested in the king. The interest in the land thus held was called a *feud*, a *fief*, or a *fee*, and they were known as *vassals*. The right remaining

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(a) The principles of the feudal law will be found in Littleton's Tenures; Wright's Tenures; Dalrymple's Hist. of Feudal Property; Sullivan's Lectures; Book of Fiefs; Spelman's Treatise of Feuds and Tenures; 2 Bl. Com. c. 5; The Capitularies; Pothier, Des Fiefs; Les Etablissements de St. Louis; Assizes de Jerusalem; Guizot, Essais sur l'Histoire de France, Ess. 5; Merlin, Rép. Feodalité; Dalloz, Dict. Feodalité.

in the lord was called a *seignory*, which signifies simply, a lordship. The estates which the mesne lords granted to their vassals were, by subinfeudations to other vassals, so reduced that they became small enough for cultivation. But even the lowest *feudatories* did not personally cultivate the soil. This laborious task was reserved for the conquered inhabitants, who were held in an abject state of slavery under the names of *serfs* or *villeins*.

The terms by which vassals of every grade held their property was upon two conditions, *fealty* and *services*. By fealty, *fidelitas*, was understood the obligation of the tenant to be faithful to his lord, and to defend him against all his enemies; he pledged himself to this allegiance by a certain form of obligation which was called *homage*. In law French the vassal said *jeo deveigne vostre home*; I become your man. *Service* was the recompense made to the lord for the use of the land; it consisted in attending him in his court during peace, and during war in his army. The terms of service were settled at the time of creating the feud, and reduced to writing by what was called a *deed of feoffment*. To complete the creation of the feud, a ceremony, called a *corporeal investiture*, which consisted in a *symbolical delivery of possession*, took place. By this the lord in the presence of the neighboring vassal by a symbol delivered possession of the land. This gave rise to the ceremony of *livery of seisin*.

Feuds were originally given for personal services rendered by the feudatory, and were only for life, but in the course of time they were granted to him and his heirs, and they became *estates of inheritance*.

The feudatory could not alien his estate, nor the lord his seignory, without mutual consent. This gave rise to *attornments*.

In the course of time the military tenures were

changed to civil tenures, such as grand sergeanty, petit sergeanty, free socage and villein socage.

Happily the feudal law never was in full vigor in the United States, though many of its principles are still retained, but they are so modified, that the inconvenience arising from them is but little felt. "These principles are so interwoven with every part of our jurisprudence," says Chief Justice Tilghman,<sup>(a)</sup> "that to attempt to eradicate them, would be to destroy the whole. They are massy stones worked into the foundation of our legal edifice. Most of the inconveniences attending them have been removed, and the few that remain can easily be removed, by acts of the legislature."

1567. In this country, all the lands were invested in the government, and no property in land can be had but where the title was deduced from the crown or the ante-revolutionary governments, or since the revolution, and the independence of the United States from the national or state governments. No foreign nation, nor any individual, whether a citizen of the United States or an alien, can make a valid purchase of the Indian title.<sup>(b)</sup> The government of the United States has never claimed the Indian lands, other than to insist upon a right of preëmption, as to the Indians themselves, and absolute sovereignty as to the rest of mankind.

In the consideration of real property, it will be necessary to ascertain, 1, the several kinds of such property; 2, the estate which may be had in the same; 3, the title by which it may be holden.

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(a) *Dunwoodie v. Read*, 3 Serg. & R. 447.

(b) *Johnson v. McIntosh*, 8 Wheat. 543; *Cherokee Nation v. Georgia*, 5 Pet. 1; *Worcester v. Georgia*, 6 Pet. 515.



TITLE I.—OF THE SEVERAL SORTS OR KINDS OF  
REAL PROPERTY.

1568. Real property consists of land, and of all rights and profits arising from and annexed to land, which are of a permanent and immovable nature. It is usually comprised under the words lands, tenements, and hereditaments.

CHAPTER I.—OF LAND.

1569. This chapter will be divided into three sections: 1, of land, and what is considered a part of it; 2, of emblements; 3, of fixtures.

SECTION 1.—OF LAND AND WHAT IS SO CONSIDERED.

1570. The term *land* comprehends any ground, soil or earth whatsoever, which is not separated from the earth, as meadows, pastures, woods, waters, marshes, furze and heath. It has an indefinite extent upward and downward,<sup>(a)</sup> so that all mines and treasures which are below the surface, belong to the owner of the soil, and its extent upward is indefinite; no man can therefore build so as to overhang his house on his neighbor's ground: *cujus est solum, ejus est usque ad calum*, is the maxim of the common law on the subject.

It is not always easy to ascertain what is land and what may be considered as personal property. The following rules will assist us in our inquiries:

1571.—1. The buildings which are erected upon

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(a) 1 Inst. 4 a; Wood's Inst. 120; 2 Bl. Com. 18; 1 Cruise, R. P. 58; Shep. To. 92.

land are a part of it, according to the maxim, *quod solo inædificatur solo cedit*, whatever is built on the soil, is an accessory of the soil.(a) Hence, if a man grant or devise the land, without mentioning the buildings, the latter will pass. It is nevertheless prudent and proper to grant or devise it with all the buildings thereon.(b)

But to this general rule there are some exceptions. It is said that a man may have an estate in a chamber, or part of a house, and an ejectment will lie for it, and the land and the other part of the house will be considered as a dwelling house and the chamber another.(c) Again, a pew in a meeting house is sometimes considered as real estate.(d)

Cases, decided upon special circumstances, may be found, where an erection upon the land of another, with his consent, were considered as not belonging to the land but being merely a simple chattel.(e)

1572.—2. Seeds which have been sown in the earth immediately become a part of the land in which they have been sown: *quæ sata solo cedere intelliguntur*.(f)

1573.—3. Trees and bushes planted by the owner of them in his own land, become a part of it, as soon

(a) Inst. 2, 1, 29; Washburn v. Sproat, 16 Mass. 449. The numerous buildings which may be erected on the land, and which are considered as a part of it, have obtained various names. The terms "mansion," "dwelling house," "house," and "messuage," are in general synonymous. Doe v. Collins, 2 T. R. 502; 1 Tho. Co. Litt. 215, n. 35. But see 9 B. & Cr. 681, and the cases there cited. See also Comm. v. Pennock, 3 S. & R. 199; 1 Leach, 89, 428; 1 East, P. C. c. 15, s. 19; 3 Inst. 64; 1 Hale, 558; 4 Bl. Com. 225; 2 East, P. C. 493; 2 Russ. on Cr. 14. A "cottage" has nearly the same meaning in law. 1 Tho. Co. Litt. 216; Shep. T. 94. As to the extent of the word "mill," see 1 Chit. Pr. 174; Bouv. L. D. Mill. A sale of land by the United States will pass the property to the purchaser in a fence, placed on it by mistake. Seymour v. Watson, 5 Blackf. 555.

(b) Com. Dig. Grant, 23; Co. Litt. 4 a; Isham v. Morgan, 9 Conn. 374. (c) Co. Litt. 48 b; Loring v. Bacon, 4 Mass. 575; Otis v. Smith, 9 Pick. 297; Bro. Ab. Demand, 20.

(d) Bouv. L. D. Pew.

(e) Wells v. Bannister, 4 Mass. 514; Doty v. Gorham, 5 Pick. 487; Aldrich v. Parsons, 6 N. H. Rep. 555.

(f) Inst. 2, 1, 32.

as they are planted, whether they have taken root or not; whether they would acquire this new quality if they belonged to another would be more doubtful. Bushes and flowers planted in boxes or pots would not possess the character of land; they would be clearly personal property.

As between the owners of adjoining estates, if the tree be planted near the division line, and the roots grow into the neighboring estate, the tree becomes the joint property of the owners of both the estates; but if the branches only overshadow the adjoining land, and the roots do not enter into it, the tree wholly belongs to the estate where the roots grow.(a)

1574.—4. Things which are attached to the freehold, though but slightly, when placed there permanently, become a part of it.(b)

1575.—5. Things which are reputed as making a part of the land, continue, even after being detached from it, to make a part of it, as long as they are destined or intended to be replaced; as when mill stones were taken out to be picked, with an intention of replacing them, they retained their quality of real estate.(c) But things which have never been used or made a part of the realty, do not acquire the character of land by being simply destined to be used on the land.

1576.—6. Straw which is raised on the land and manure made upon it, are considered as a part of it, unless an intention be manifested by the owner that it shall be considered personal estate.(d) But when it is not raised in the course of agriculture, as, for

(a) 1 Swift's Dig. 104; *Waterman v. Soper*, 1 Ld. Raym. 737; *Griffin v. Bixby* 12 N. H. Rep. 454. But see contra *Lyman v. Hale*, 11 Conn. 177; *Holder v. Coates, Moo. & Malk.* Ca. 112.

(b) Bull N. P. 34; *Pyle v. Pennock*, 2 W. & S. 390; 2 W. & S. 116.

(c) Dig. 19, l. 17, 10; *Goodrich v. Jones*, 2 Hill, 142.

(d) *Alleyne* 31; *Stone v. Proctor*, 2 Chip. 115; *Lassel v. Reed*, 6 Greenl. 222; *Middlebrook v. Corwin*, 15 Wend. 169; *Goodrich v. Jones*, 2 Hill, 142.

example, by a livery stable keeper, it is considered as personal property.(a)

1577.—7. Those things which in their nature do not in themselves belong to us, but are ours only because they are found on our land, are considered as making a part of the land; such, for example, are animals, which being in their perfect natural liberty in a certain place, are considered a part of such place. "If a man hath fish in a pond," say some old authorities, "and die, they go to his heir, for they are considered as the profits thereof, and therefore descend with the pond to the heir."(b)

1578.—8. The fruits and productions of the earth, other than emblements, while they are hanging by the roots, are a part of the real estate.(c) This agrees with the Roman law. Galus tells us, *Fructus pendentes pars fundi videntur*;(d) and Ulpian, *Fructus perceptos villæ non esse constat*;(e) for as soon as they are severed or gathered, they are personal property. An apple hanging were it grew, is real estate; if shaken by the wind, and blown upon the ground, it is personal. In the first case, it descends to the heir, and is not the subject of larceny; in the last, it goes to the executor, and may be stolen.

1579.—9. Things which though personal in their nature, or movable, which are constructively attached to the real estate, are considered as real property; the keys of a house, title deeds and the box in which they are kept, and heir-looms, are of this kind.(f)

1580.—10. Water of itself is never considered as land. In its nature it is incapable of being fixed, for, though apparently standing still, it is constantly

(a) Daniels v. Pond, 21 Pick. 367.

(b) Bac. Ab. Executors, &c. (H); Co. Litt. 8; Off. Ex. 57; Swinb. 403.

(c) Bac. Ab. Executors, &c. (H); Off. Ex. 59; Godolph. 122.

(d) Dig. 6, 1, 44.

(e) Dig. 19, 1, 17, 1.

(f) Shep. To. 90.

changing. When it is conveyed, the land covered by it must be granted as so much land covered with water; a simple grant of water would give the grantee only a right to fish in it.(a) A grant or devise of a mill, and its appurtenances even without the land, will carry the whole right of using the water enjoyed by the former owner, as requisite to its use and a necessary incident.(b)

1581.—11. As land extends downward to the centre of the earth, mines and minerals found in it form a part of, and pass under the name of land. Unless expressly excepted, mines would be included in a conveyance of land, without being expressly named, and so *vice versa*, by a grant of a mine, the surface of the land itself, if livery be made, will pass.(c)

#### SECTION 2.—OF EMBLEMENTS.

1582. The word *emblemment* is said to be derived from the old French word *embléer*, to sow wheat. By *emblemments* is meant the crops growing upon the land. *Crop* here signifies the products of the earth, which grow yearly and are raised by annual expense and labor, or “great manurance and industry,” such as grain; but not fruits which grow on trees, which are not planted yearly, grass, and the like, though they are annual.(d)

1583. A distinction is made between a *tenant for life*, whose right may terminate at any time by death, and a *tenant for years*, whose title is to expire at a known period. The tenant for life sows in the hope of reaping, and, if his right terminates by his death, justice, as well as good policy, requires that his execu-

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(a) 2 Bl. Com. 18; Brownl. 142.

(b) Cro. Jac. 121; Baine's lessee v. Chambers, 1 S. & R. 169; Strickler v. Todd, 10 S. & R. 63; Hall v. Benner, 1 Pennsylv. 402.

(c) Coke Litt. 6; 1 Tho. Co. Litt. 218; Shep. To. 26.

(d) Co. Litt. 55; Com. Dig. Biens, G. 1.

tors should enjoy the emblements, that they should reap the crop which he has raised, as it was to the interest of society that the land should not go untilled.(a) This right in the tenant for life, extends to every case where the estate for life determines by the act of God or the act of law, and not to cases where the estate is ended by the voluntary, wilful, or wrongful act of the tenant himself.(b)

In general, a *tenant for years* is not entitled to emblements, because, knowing the time when his lease is to determine, it is his folly to sow where he cannot reap. But when this reason does not apply, and his estate may determine by an uncertain event, the rule has no longer any force. When the tenant for years holds under a tenant for life, and the estate terminates by the death of the latter, the former, standing in his place, shall have the emblements.(c)

In several states of the Union, the right to emblements is regulated by statute or by custom, varying from the rules of the common law.

### SECTION 3.—OF FIXTURES.(d)

1584. As a general rule, all things which are attached to the freehold, or annexed to the land, become a part of it. But such annexation must have been made with an intention that it should be of a permanent nature and firmly fixed, either by the owner or by a wrong doer. In many cases annexa-

(a) *Stewart v. Doughty*, 9 John. 112; 1 Chit. Pr. 91; Bac. Ab. Executors, H 3.

(b) *Debow v. Titus*, 5 Halst. 128; *Oland's Case*, 5 Co. 116; *Bulwer v. Bulwer*, 2 Barn. & Ald. 470.

(c) Co. Litt. 56.

(d) See *Amos & Ferard on Fixtures*; Vin. Ab. Landlord and Tenant, A; Bac. Ab. Executors, &c. H 3; Com. Dig. Biens, B and C; 2 Chit. Bl. 281, n. 23; Co. Litt. 53 a, and note 5, by Harg.; Ham. on Parties, 182; Am. Jur. No. 19, p. 53; Archb. L. & T. 359.

tions are made, not possessing these requisites, and they are liable to be removed. They are called *fixtures*.

Fixtures are personal chattels annexed to land, and which may afterward be severed and removed by the party who has annexed them, or his personal representatives, against the will of the owner of the freehold. The term fixture is one denoting the reverse of its name.

Not unfrequently questions arise as to whether fixtures shall be considered real estate, or part of the freehold; or whether they are to be treated as personal property. To decide these it is proper to consider the mode of annexation; the object and customary use of the thing annexed; the character of the contending parties; and the time when they may be removed.

§ 1.—Mode and intention of annexation.

1585. By annexation is understood every mode by which a chattel can be joined or united to the freehold; and whether such annexation is to be considered as making the chattel annexed a part of the freehold, or not, depends upon circumstances. The following rules will enable us to ascertain whether the annexations form a part of the real estate, or whether they are fixtures which can be removed.

1. When things are so affixed to a building that they are to remain there perpetually, they make a part of it; *secus*, if they are placed there only for a time.<sup>(a)</sup>

2. When the things are so attached to a building that they cannot be detached without breaking something, they are presumed to be there as permanent, and they make a part of the freehold; as locks, iron stoves set in brick work, posts and window blinds,

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<sup>(a)</sup> *Voorhis v. Freeman*, 2 W. & Serg. 116; *Oves v. Ogelsby*, 7 Watts, 106; *Bac. Ab. Executors, etc.* H 3.

built in the wall.(a) When not fastened or let into the soil, but merely laid upon the ground, such a chattel will not make a part of the realty.(b)

3. Things which serve to complete a house, although they are not attached to it, are a part of the realty; as for example, the keys and padlocks used for fastening it, and movable shutters which are taken down in the morning and put up at night to fasten a storehouse.

§ 2.—The object and customary use of the thing annexed.

1586. When a chattel is annexed to the freehold, the general rule is that it becomes a part of it.(c) But to this there are several exceptions. These are,

1. Where there is a manifest intention to use the fixture in some employment distinct from that of the occupier of real estate.

2. Where the chattel has been annexed for the purpose of carrying on trade, it is not in general considered a part of the realty; the fact that it was put up for this purpose, indicates an intention that the annexation should not be permanent.(d) But if there was a clear intention that the chattel should be annexed to the realty, its being used for the purposes of trade, would not bring the case within one of the exceptions.(e)

§ 3.—Of the character of the claimants.

1587. There is a difference as to what fixtures may or may not be removed, as the parties stand in one

(a) *McDaniel v. Moody*, 3 Stew. 314. But see *Goddard v. Chase*, 7 Mass. 432; *Union Bank v. Emerson*, 15 Mass. 159; *Pyle v. Pennock*, 2 W. & S. 390; *Voorhis v. Freeman*, 2 W. & S. 116; *Despatch Line v. Belamy Man. Co.* 12 N. H. Rep. 205.

(b) *Bull. N. P.* 34; *Elwes v. Maw*, 3 East, 38; *Horn v. Baker*, 9 East, 215. See *Beckwith v. Boyce*, 9 Misso. 560.

(c) *English v. Foote*, 8 Sm. & M. 444.

(d) *Leman v. Miles*, 4 Watts, 330; *Taffe v. Warwick*, 3 Blackf. 111.

(e) *Fitzherbert v. Shaw*, 1 H. Bl. 260. See *Van Ness v. Pacard*, 2 Pet. 137; *Hunt v. Mallanphy*, 1 Mis. 620.



relation or another. These classes will be separately considered.

*Art. 1.—Between the executor and the heir.*

1588. When the owner of an estate dies, it sometimes becomes a question whether things annexed shall descend to the heir with the realty, or pass to the executor as personal property. In England the rule that the annexation turns the chattel into realty is the most rigid as between these persons, and the heir will in general take the thing annexed as a part of his estate. In this country the rule is of little practical importance, because the real and personal property of one deceased is generally subject to precisely the same appropriation, either for the benefit of creditors or next of kin. Still, there may be frequent occasion for the application of the rule, as, for example, when a testator devises all his real estate to one or more devisees, and bequeaths his personal to another person.(a)

Though the general rule is that the chattel annexed shall be considered as realty, yet if the ancestor manifested an intention which is to be inferred from circumstances, that the things affixed should be considered as personalty, they will be so treated, and will belong to the executor.(b)

*Art. 2.—Between the devisee and the executor.*

1589. On a devise of the real estate, things permanently annexed to the realty, at the time of the testator's death, will pass to the devisee. He has the same rights, as to fixtures, as a vendee.(c)

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(a) Bac. Ab. Waste C.

(b) Bac. Ab. Executors, etc, H. 3.

(c) 2 Barn. & Cr. 80.

*Art. 3.—Between tenants for life or their executors, and remainder-man or reversioner.*

1590. Between these parties the law is liberal, and the executors of such tenant will be entitled to remove all fixtures put up by him. He has the same rights of a tenant for years, and it has accordingly been held that steam engines erected in a colliery, by a tenant for life, belonged to the executor and not to the remainder-man.(a)

*Art. 4.—Between the vendor and vendee.*

1591. The rule that chattels annexed to the freehold become a part of it, is as strict between the vendor and vendee, as between the executor and the heir.(b) Fixtures erected by the vendor for the purposes of trade, as potash kettles for manufacturing ashes,(c) or dye kettles used in dyeing,(d) pass to the vendee of the land.

Between the mortgagor and mortgagee, the rule is the same as between the vendor and vendee.(e)

*Art. 5.—Between the landlord and tenant.*

1592. For the purpose of promoting trade and agriculture, the ancient rule of annexation has been much relaxed in favor of the tenant, and the right of removing fixtures by the tenant, is the most extensive. The right to remove erections made by himself extends to the following cases :

1. He may remove implements of trade, as, for instance, furnaces or vats and coppers of a soap boiler ; or a kettle and boiler in a tannery, put up with brick

(a) *Lawton v. Lawton*, 3 Atk. 13.

(b) *Despatch Line v. Bellamy Man. Co.*, 12 N. Hamp. 205 ; *Preston v. Briggs*, 16 Verm. 124 ; *Miller v. Plumb*, 6 Cow. 665.

(c) *Cowen*, 663.

(d) *Noble v. Bosworth*, 19 Pick. 314.

(e) *Amos & Fer. on Fxt.* 188 ; *Preston v. Briggs*, 16 Verm. 124 ; *Despatch Line v. Bellamy Man. Co.*, 12 N. Hamp. 205 ; 15 Mass. 159.

and mortar; or stills set up in a furnace for making whiskey.(a)

2. Machinery, as a steam engine.(b)

3. Buildings erected for the purposes of trade. The tenant who erects these may remove them, though the trade be of an agricultural nature.(c) When the thing annexed is put up for the purposes of trade, and also with an intent to obtain greater profits of the land; as cider mills, or machinery for working mines and the like, the right of removal will, perhaps, depend upon the fact whether the primary object of annexation was or was not trade.

4. The tenant may also remove articles annexed for ornament or domestic use, unless by so doing he cannot leave the estate in as good a condition as when he took it.(d) Shrubs and trees on land leased as a nursery are personal chattels, as between the landlord and his tenants, and the tenant may therefore remove them;(e) but he cannot plough up strawberry beds in full bearing, though he purchased them of a previous tenant.(f)

There seems to be no good reason why the same privilege of removing fixtures should not be allowed in a case between a landlord and tenant at will.(g)

§ 4.—The time when the fixtures must be removed.

1593. A distinction must be observed between a *tenant for years* and a *tenant for life*. The first has a

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(a) *Pillow v. Love*, 6 Hayw. 109; *Van Ness v. Packard*, 2 Pet. 137; *Cresson v. Stout*, 17 John. 116; *Lemar v. Miles*, 4 Watts, 330; *Union Bank v. Emerson*, 15 Mass. 159.

(b) *Swift v. Thompson*, 9 Conn. 63; *Sturgis v. Warren*, 11 Verm. 433.

(c) *White v. Arndt*, 1 Whart. 94; 2 Pet. 137.

(d) 4 Pick. 311.

(e) *Miller v. Baker*, 1 Met. 27.

(f) *Watherell v. Howells*, 1 Camp. 227; *Empson v. Soden*, 4 Barn. & Ald. 655.

(g) *Doty v. Gorham*, 5 Pick. 487; *Whiling v. Brastow*, 4 Pick. 310.

known and definite time in the estate, and he is therefore required to perform every act in relation to the estate, during the time he has possession. When he has placed fixtures upon the premises, which he intends to remove, he must take care that they are removed while he is in possession. He may, however, remove them at any time before he gives up or surrenders the premises, although his lease may have expired, and he is *holding over*, that is, keeping possession of the premises, without the consent of the landlord, after the term of his lease has expired.(a) But if he surrenders the lease, without reservation, he thereby relinquishes all his rights to the fixtures.(b)

The rule with regard to *tenants for life* does not apply to tenants for years or tenants at will, because the time when their estates ceased is uncertain. They may, therefore, upon the determination of their estates, not occasioned by their own faults, have a reasonable time within which to remove the fixtures. Hence their right to bring an action for them.(c) In case of their death, the right passes to their representatives.

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## CHAPTER II.—OF TENEMENTS.

1594. *Tenement*, in its most extensive signification, comprehends every thing which may be *holden*, provided it be of a permanent nature; and not only lands and inheritances which are holden, but also rents and profits *à prendre* of which a man has a frank tenement, and of which he may be seised *ut de libero tenemento*, are included under this term.(d) But the word tene-

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(a) 1 B. & Cr. 79. See *Taylor v. Townsend*, 8 Mass. 411; *Washburn v. Sproat*, 16 Mass. 449.

(b) *Shepard v. Spaulding*, 4 Met. 416.

(c) *Lawton v. Lawton*, 3 Atk. 13.

(d) Co. Litt. 6 a; 1 Tho. Co. Litt. 219; Perk. s. 114; 2 Bl. Com. 17.

ment, without other circumstances, has never been construed to pass a fee.<sup>(a)</sup> In its most confined and vulgar acceptation, it means a house or building.<sup>(b)</sup>

### CHAPTER III.—OF HEREDITAMENTS.<sup>(c)</sup>

1595. This word, *hereditaments*, more extensive in its signification than land or tenements, signifies any thing capable of being *inherited*, be it corporeal or incorporeal, real, personal or mixed, and includes not only lands and every thing thereon, but also heirlooms, and certain furniture, which by custom descends to the heir together with the land.<sup>(d)</sup> By this term such things are denoted as may be the subject-matter of the inheritance, but not the inheritance itself; it cannot, therefore, by its own intrinsic force, enlarge an estate, *ergo gratia* a life estate, into a fee.<sup>(e)</sup>

#### SECTION 1.—OF CORPOREAL HEREDITAMENTS.

1596. Hereditaments are divided into corporeal and incorporeal. The corporeal hereditaments are confined to lands; they have been considered in the two preceding chapters. In the next section will be examined the law relating to incorporeal hereditaments.

#### SECTION 2.—OF INCORPOREAL HEREDITAMENTS.

1597. *Incorporeal* real property is a right issuing out of, or annexed to, a thing corporeal. It is so

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(a) 10 Wheat. 204.

(b) 1 Prest. on Estates, 8.

(c) See Shep. To. 91; Cruise's Dig. tit. 1, s. 1; Wood's Inst. 221; Dane's Ab. Index, h. t.; 1 Chit. Pr. 203—229.

(d) Co. Litt. 5 b; 1 Tho. Co. Litt. 219; 2 Bl. Com. 17.

(e) 2 B. & P. 251; Doe v. Allen, 8 T. R. 503; 1 Tho. Co. Litt. 219, note T.

called because it has no *corpus*, and is not tangible nor visible. It is not the object of the senses, but exists only in idea and in contemplation of law. Although it is thus unsubstantial, it may produce something substantial and beneficial to the owner. *Corporeal* property, as has already been observed, is in the land itself; the incorporeal is merely the right to have some *part* only of the produce or benefit of the corporeal property, or to exercise a right, or have an easement, or privilege, or advantage over, or out of it.

1598. A marked difference exists in their *transfer*. The possession of corporeal property, as houses and lands, is capable of actual and visible delivery or transfer, and, for this reason, it is said *to lie in livery*, that is, delivery of seisin or possession. Incorporeal property, on the other hand, is incapable of actual possession, and passes by mere deed of grant, or such other conveyance as amounts to a grant, and it is, therefore, said *to lie in grant*.<sup>(a)</sup>

1599. According to Blackstone, there are in the English law, ten kinds of incorporeal hereditaments; a number which our institutions have much abridged. Happily we have no advowsons, tythes, dignities, hereditary offices nor corodies. Some others which are not classed under this head, by the old English lawyers, will here be considered as incorporeal inheritances. These will be considered under five different heads: 1, of easements; 2, of profits *à prendre*; 3, of rent; 4, of annuities; 5, of franchises.

#### § 1.—Of easements.

1600. The most numerous class of incorporeal hereditaments form what is called easements. An

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<sup>(a)</sup> Co. Litt. 9. 172; Com. Dig. Grant. An incorporeal hereditament will pass by other conveyances than mere grants, as by bargain and sale, Croz. Eliz. 166; covenants to stand seised, and by lease and release. See 2 Bl. Com. 317.

*easement* is a charge, imposed upon one estate, for the benefit of another, belonging to another owner. No easement can exist when the two estates belong to the same person: *nulli enim res sua servit jure servitutis*.(a)

An easement is very similar to the servitude of the civil law; it is, however, not so extensive in its signification. A *servitude* comprehends, in addition to the easement of the common law, many rights which, in the latter, fall under the division of *profits à prendre*.(b)

The estate which is entitled to the easement is called the *dominant*, and the estate which owes it, is denominated the *servient* estate.

This subject naturally divides itself as follows: 1, the requisites of an easement; 2, the kinds of easements; 3, the manner of extinguishing them.

*Art. 1.—Of the requisites of an easement.*

1601. The principal requisites of easements are, 1, that they be imposed upon corporeal real property; 2, that they be for the benefit of corporeal real property; 3, that there be two distinct estates, the dominant and the servient; 4, that the nature of the right be such as can be inherited.

1. *What property is subject to an easement.*

1602. The *right* conferred by an easement attaches upon the soil of the servient estate; this latter must be corporeal real estate. The owner is bound only while he owns the estate, and during this time all that can be required of him is that he will do nothing to alter or change it, so as to interfere with the rights of

(a) Dig. 8, 2, 26; *Grant v. Chase*, 17 Mass. 443.

(b) Ham. N. P. 172. *Profits à prendre* are those taken and enjoyed by the proprietor himself; *profits à rendre* are those which are received at the hands of, and rendered by another.

the owner of the dominant estate, or to prevent his full enjoyment of the easement.(a)

The *obligation* of the owner of the servient estate continues only while he remains so; for, upon his conveying it to another, the obligation passes to the new proprietor. This is so completely the case, that if any disturbance of the easement has taken place previous to the transfer, although such tortious act would give a right of action to the owner of the easement, against such former proprietor, yet his successor would be responsible if he allowed such disturbance to continue.(b)

. 2. *Of the servient estate.*

1603. An incorporeal hereditament may be granted to another in two ways: 1, to be enjoyed by him either in his individual capacity; as where Primus grants to Secundus a right of common for the term of his life, to him and to his heirs, or for any other duration of interest; in this case, the right is said to be *in gross* or annexed to the person of the grantee.

1604.—2. The grant may be to him as proprietor of a corporeal hereditament; for example, where a common of pasture is granted to hold as an appurtenance to the landed estate of the grantee; it is then said to be annexed or *appurtenant* to his estate in the land. The law allows this annexation to be made, in order that the estate to which it is appurtenant may be enjoyed with greater ease and benefit to the proprietor.

When *personal rights*, which in their mode of enjoyment bear a strong resemblance to easements, are conferred by grants, independently of the possession of any tenement by the grantee, they give a right of

(a) *Taylor v. Whitehead*, 2 Dougl. 749. See *Bullard v. Harrison*, 4 M. & S. 387; *Pomfret v. Ricraft*, 1 Saund. 322.

(b) *Penruddock's Case*, 5 Rep. 101.



action on the contract, for any disturbance, but they are not possessed of the incidents of an easement.

3. *There must be two distinct estates, the dominant and the servient.*

1605. The dominant estate must belong to one person and the servient to another. One must *owe a duty* to which the other is entitled as *a right*. On the title to both being united in one individual or set of individuals, the easement becomes extinguished; it is immediately merged in the higher estate.(a) But, in this case, the owner must have a valid title to the dominant estate, in order to create an extinguishment by a unity of possession.(b)

The easement is essentially due by the *servient estate* to the *dominant hereditament*, and it remains the same while nothing has been changed in relation to the two estates, although there may have been changes with regard to the two owners. The faculty of using an easement, considered alone, and separated from the dominant estate, cannot be sold, nor hired, nor given. He who has a just title to the dominant estate has alone the right of using the easement, without being able to confer his right to other possessors of another estate, nor even to extend the right to other estates, owned by himself.(c) When the owner of the dominant estate sells a part of it to another, the purchaser will be entitled to use it as far as his estate extends, as well as the seller.(d)

*Art. 2.—Of the different kinds of easements.*

1606. Easements arise in a variety of ways:

(a) *Holmes v. Goring*, 2 Bing. 83; S. C. 9 Moore, 166; *Grant v. Chase*, 17 Mass. 443.

(b) *Tyler v. Hammond*, 11 Pick. 193.

(c) *Kirkham v. Sharp*, 1 Whart. 323; *Road from Lazaretto*, 1 Ashm. 417; *Lewis v. Carstairs*, 6 Whart. 193.

(d) *Watson v. Bioren*, 1 S. & R. 227.

1, those which are derived from the situation of the dominant and servient inheritance; 2, those which are established by the law; 3, those created by the agreement of parties.

1. *Of easements which arise from the situation of places.*

1607. The respective situation of two estates renders one subject to the other in relation to certain matters, without any title whatever. This subjection may be called a *natural* easement, because it arises from nature, that is, the manner in which it has disposed of the ground of the two estates.

These easements may in general be classed as follows: 1, of rain water; 2, of springs; 3, of water courses.

1° *Of rain water.*

1608. When the land is so located that rain water naturally descends from the estate of the superior proprietor to the inferior estate, in rural situations, the inferior owner cannot do any thing to prevent the course of such water; if he were to build a wall at the upper part of his estate, by which he would prevent the water from descending on it, and, by that means, overflow the superior inheritance, he would do an injury to his neighbor. On the other hand, if the owner of the superior estate were to build a wall, by which he would deprive the inferior of the advantage of the moisture, and the benefit of such rain water, he would commit a tort toward the owner of the inferior inheritance.

2° *Of springs.*

1609. The owner of the land is entitled to all the advantages which arise from it. When a spring of water is found on his land he may use it, as he does any other property which is the produce of his estate,

without regard to the convenience or advantage of his neighbors. This right is very different from the right of the owner of an estate through which a water course flows.

An estate on which there is a spring may, however, be subject to an easement; that is, the owner of another may have a right to draw water there, or water his cattle. But this is not a natural easement, it is one which must arise from a grant or prescription.

### 3° Of water courses.

1610. It will be well to observe a distinction which exists in easements of which running water is the subject. The right to receive a flow of water and to transmit it in its accustomed course, may be called a *natural* easement: the right to interfere with the accustomed course, either by damming it and forcing it upon the land above, or transmitting it altered in quality or quantity, to the inferior inheritance, may be called an *artificial* easement.

These natural easements appear, in some degree, to partake of the character of rights of property, and it has been asserted, that inasmuch as the flow cannot be claimed as water, but as land, the water is therefore identified with the realty.(a) But it must be recollected that the easement does not consist *in the right to the fluid*, but *in the current*.(b) It is the right to receive the current, from the superior estate, and the obligation to transmit it to the inferior, which makes the natural easement.

1611. By *water course* is usually understood the flow or movement of water in rivers, creeks, and other streams, above ground. In the examination of the

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(a) Angell on Wat. Co. 57.

(b) Gale & Whatl. on Easem.

subject it will be proper to consider, 1, the rights of the owner of the superior estate; 2, the rights of the proprietor of the inferior inheritance; and 3, the rights of riparian owners.

*1st. Of the rights and obligations of the owner of the superior estate.*

1612. The right to a water course is not a right to the fluid itself, so much as a right to the *current of the stream*. This right is not acquired by grant or prescription, it begins *ex jure naturæ*; the water having taken a certain course naturally cannot be diverted. (a) *Aqua currit et debet currere*, is the language of the law. (b)

The only property which the owner of the superior estate has in the water, is the *temporary use* of it. (c) It may be safely laid down as a general rule, that the owner of the superior estate may use the water as he pleases, provided he does not prejudice the other proprietors, above and below him; (d) though he may use the water while it runs over his lands, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel, when it leaves his estate. Without the consent of the inferior proprietor, he cannot divert or diminish the quantity of the water, which would otherwise descend to the proprietor below. But this will not deprive him of such a reasonable use of it by watering his cattle, or for domestic purposes, as he may need, for such use would not very perceptibly diminish the ordinary flow of the river. (e) Nor can the proprietor so use the

(a) *Shurry v. Piggot*, Bulst. 339.

(b) *McCalmont v. Whitaker*, 3 Rawle, 84, 88; 9 Co. 57 b; *Merritt v. Parker*, 1 Coxe, 460.

(c) *Williams v. Moreland*, 2 B. & Cr. 910.

(d) *Whittier v. Cocheco Man. Co.*, 9 N. Hamp. 454.

(e) *Bealy v. Shaw*, 6 East, 206; *Crooker v. Bragg*, 10 Wend. 260; *Palmer v. Mulligan*, 3 Caines, 315; *Miller v. Miller*, 9 Penns. St. R. 74; *Wright v. Howard*, 1 Sim. & St. 190; *Mason v. Hill*, 3 Barn. & Ald. 304.

water as to run it back on the owner of the estate above him; he cannot alter the level of the water, either where it enters or where it leaves his property.(a)

*2d. Of the rights and obligations of the owner of the inferior estate.*

1613. The rights of the owner of the inferior estate are, to have the whole current, without diminution or alteration, to flow on his land, in its accustomed channel,(b) although a less quantity might serve him in all his necessary purposes.(c)

The inferior inheritance is bound to receive the water, and the proprietor cannot erect any dam or other buildings to prevent it from flowing upon his estate, and by that means force it back upon the dominant property.

*3d. Of the rights and obligations of the riparian proprietors.*

1614. By *riparian proprietors* the civilians mean the owners of land bounding upon a water course. This convenient term has been adopted by the courts and writers on American law.(d)

When there is a riparian owner on one side of the stream, and another on the other, each owns that portion of the bed of the river (not navigable) which is adjoining his land, *usque ad filem aquæ*, or in other words, to the thread or central line of the stream.(e) If hydraulic works are erected by one of them, he has the right to use one half of the stream, for the opposite owner has the same right to erect such works on his

(a) 9 Co. 59; *McCalmont v. Whitaker*, 3 Rawle, 84; *Norton v. Valentine*, 14 Verm. 239; *Hendricks v. Johnson*, 6 Port. 472; *Webster v. Fleming*, 2 Humph. 518; *Evans v. Merriweather*, 3 Scam. 402.

(b) 6 East, 206; *Hoy v. Sterrett*, 2 Watts, 329; *Merritt v. Parker, Coxe*, 460; *Pugh v. Wheeler*, 2 Dev. & Bat. 50; *Twiss v. Baldwin*, 9 Conn. 291.

(c) *Miller v. Miller*, 9 Penn. St. R. 74.

(d) *Tyler v. Wilkinson*, 4 Mason, 397; 3 Kent. Com. 440, 4th ed.; *Angell on Wat. Courses*, 3; *Bouv. L. D. h. t.*

(e) *Hargr. Tr.* 5; 3 *Caines*, 319; *Kames Eq. part 1, c. 1, s. 1.*

side, and each has an equal right to use the water.(a) But, still, the water can be used by each only as an entire stream, in its natural channel, for it would be impossible to make a severance of it.(b)

In case, however, that owing to a natural cause, the water could be separated, as if an island were to arise in the river, so as to give one riparian owner one-fourth of the remaining water, and three-fourths to the other, the latter would have a right to use the water on his side, but he would not be allowed to construct hydraulic works, a dam, for example, beyond the thread of the stream.(c)

2. *Of easements established by operation of law.*

1° *Party walls.*

1615. A *party wall* is one erected on the line between two estates, owned by different persons, for the use of both estates. The owners of a party wall, built at joint expense, are not tenants in common, but each is the proprietor of his own land, with a right to use the wall, and it is this which creates the easement. But inasmuch as the two parts of the wall are inseparable, and form together but one and the same *corpus*, the wall is considered, as between the owners, something in common.(d)

Let us see how a party wall is established, the rights which arise from it, and the obligations which are its result.

1st. *How a party wall is established.*

1616. The right to a party wall may arise in con-

(a) *Arthur v. Case*, 1 Paige, Ch. R. 448.

(b) *Vandenberg v. Van Bergen*, 13 John. 212.

(c) 10 Wend. 260.

(d) See *Matts v. Hawkins*, 5 Taunt, 20; *Cubitt v. Porter*, 8 Barn. & Cr. 257.

sequence of the *special agreement* of the parties, and, in that event, whatever are the provisions of the contract, they govern. In the absence of any agreement, party walls are generally regulated by the acts of the local legislatures. The principles of these acts are generally that the wall shall be built equally on the lands of the adjoining owners, at their joint expense.

When only one of the owners of two adjoining lots wishes to build, he has a right to build the wall of the usual thickness, partly upon his own ground, and partly upon the adjoining estate. In this case, when the other owner is desirous of building, he may use so much of such party wall as he may want, by paying one half of its value to the first builder, and then they are joint owners of so much of such party wall.

In case the first builder erects his wall within his own line, so as to leave a space beyond that which is required by law, to be allowed to the adjoining owner, such wall can never become a party wall; but if such first builder should erect his wall so that the outer face should be on the line, then it will become a party wall on the adjoining owner building against it.

*2d. Of the rights which arise from a party wall.*

1617. Each of the owners of a party wall may place his joists in it, and use it for the support of his roof. Each may use the wall for all the purposes to which it is destined, he is limited in his right so far only as not to cause his neighbor any injury.

Each may raise the wall to such a height as he may deem proper, without, however, endangering his neighbor, and provided by such raising the rights of the neighbor be not infringed, as for example, by depriving him of some easement to which he is entitled.

When the party wall has been built, and one of the adjoining owners is desirous of having a deeper foundation, he has a right to undermine such wall, using due

care and diligence to prevent any injury to his neighbor, and, having done so, he is not liable for any consequential damages which may ensue.(a)

It is evident that the parties can use the party wall for no other purpose than those for which it was intended. One of them cannot therefore open a window through such wall, without the consent of the other, nor put a stove-pipe there, nor do any thing which would encroach on his neighbor, beyond the line between the two properties.

*3d. Of the obligations which result from a party wall.*

1618. The obligations which the party wall impose on the proprietors, are, that each will take ordinary care of it. But the charges, the most important in relation to it, are its repairs and reconstruction. Each one is bound to pay for one half of the repairs of so much of it as he uses.

When a wall is unfit for the use intended by one of the owners, he should cause it to be examined by the proper officer, where such an officer exists, and cause it to be condemned. He may then pull it down; but this must be done with care, and with notice to the opposite party, of his intention to do so a reasonable time before it is done, so as to give an opportunity to the latter to protect his house from injury.

He who takes down the wall is required to erect another in its place in a reasonable time, and with the least possible inconvenience; the other owner must contribute to the expense, if the wall required repairs, but such expense will be limited to the costs of the old wall.(b)

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(a) *Lassala v. Holbrook*, 4 Paige, 169; *Richart v. Scott*, 7 Watts, 460; *Dodd v. Holme*, 3 N. & Man. 739; *S. C. A. & Ellis*, 473. See *Thurston v. Hancock*, 12 Mass. 221; *Raine v. Alderson*, 4 Bing. N. C. 702.

(b) *Campbell v. Messier*, 4 John. Ch. 334.



2<sup>o</sup> *Of ancient lights.*(a)

1619. Another legal easement, is the enjoyment of an ancient window, by which a right is acquired by prescription to use it to the inconvenience and loss of the owner of the adjoining estate. *Ancient lights* are windows which have been opened for twenty years, and enjoyed without molestation by the owner of the house.

The English doctrine, which is examined below, can be hardly regarded as applicable to narrow lots in the new and growing cities and towns in this country; for the effect of the rule would be to impair greatly the value of vacant lots, or those having low buildings upon them, in the neighborhood of other buildings more than twenty years old.(b)

1st. *How the right of ancient light is gained, and its extent.*

1620. This right may in England be gained in two ways: 1, by *grant*, which it is not proper to consider under this head, as that is a conventional mode of gaining the right; and, 2, by *prescription*, which is strictly a legal easement, as it arises from the act of the law, or by so long a use of time as will raise a presumption that a grant existed.

Formerly, a party could not gain a right to a window but by prescription, without the consent of the owner of the adjoining estate.(c) But, in modern times, upon proof of an adverse enjoyment of lights for twenty years or upward, unexplained, a jury may be directed to presume a right by grant or otherwise.(d)

(a) See 1 Nels. Ab. 56, 57; 16 Vin. Ab. 26; 23 Am. Jur. 46 to 64; Matt. on Pres. 318 to 323; 1 Chit. Pr. 206, 208; 1 Leigh's N. P. ch. 6, 3, 8; Story, Eq. § 926; 1 Sm. Ch. Pr. 593.

(b) 3 Kent, Com. 446, n.; Parker v. Foote, 19 Wend. 309.

(c) 1 Leon. 188; Cro. Eliz. 118.

(d) 2 Saund. 175, a; Story v. Odin, 12 Mass. 159.

When, however, there are circumstances which explain this apparent acquiescence, the right will not be acquired; as, where a window was opened during the seisin of a mere tenant for life, or a tenancy for years, and the owner of the fee did not acquiesce in, or know of, the use of the light.(a)

1621. The *extent* of the right is limited, when acquired by lapse of time, to the use to which it has been applied; for example, where a house had been used as a malt house with small windows, sufficient for that purpose, and it was converted into a dwelling, which required larger windows, it was held to be entitled to the same quantity of light it had in its former state, and no more.(b)

Light and air are necessary to a dwelling, so as to give the owner the full enjoyment of his estate, but this necessity does not extend to a *prospect*, or *view from it*; the owner of the adjoining estate may, therefore, build so as to intercept the view of the first builder,(c) or disturb his privacy.(d)

The right to a window opening upon a neighbor may be acquired by the acts of the parties; as, where houses adjoining each other are built by one person *upon a plan*, and afterward he separates the ownership or occupation, each party taking a part, impliedly engages not to alter or affect the existing state of the buildings, and in that case, even six years, or less, will give as perfect a right to the free use of a modern window, as in any other case twenty years' adverse enjoyment would create.(e) Upon the same principle,

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(a) *Daniel v. North*, 11 East, 372.

(b) *Martin v. Goble*, 1 Camp. 322. See *Chandler v. Thompson*, 3 Campb. 80.

(c) *Aldred's Case*, 9 Co. 58; *Attorney General v. Doughty*, 2 Ves. 432; *Crabb on R. P.* § 446; *Bac. Ab. Actions in General*, B; *Mohan v. Brown*, 13 Wend. 261.

(d) *Cotterell v. Griffiths*, 4 Esp. 69.

(e) *Compton v. Richards*, 1 Price, 27; *Rivere v. Bower*, 1 Ry. & Mo. 24; *Story v. Odin*, 12 Mass. 157. See *Selden v. Williams*, 9 Watts, 13; 1 Lev. 122; 2 Saund. 114, n. 4; 1 Leigh's N. P. 559.

where the owner of a house with a window on a vacant lot, which belongs to him, sells it, without any reservation as to the window, the purchaser will be entitled to the window.(a)

*2d. What amounts to an interruption of an ancient light.*

1622. When an interruption of a light takes place, the time which is required to give the owner of it a right by prescription, commences from his assertion of the right after such interruption. The best remedy to prevent such window from gaining the character of an ancient light, is to build opposite to it so as to block it up.(b)

The right to an ancient light may be lost by agreement of the parties; and where the window has been completely blocked up for twenty years, it loses its privilege.(c)

*3d. Of the remedy for interrupting an ancient light.*

1623. Where an ancient light has been unlawfully interrupted, an action on the case lies against the tortfeasor.(d) And, when the right is clearly established, courts of equity will grant an injunction to restrain a party from building so near the plaintiff's house as to darken his windows.(e)

*3°. Of drain, drip, and support.*

1624. There are numerous easements which arise from vicinage, particularly in urban districts: among the most prominent of these are drain, drip, and support.

(a) *Palmer v. Fletcher*, 1 Lev. 122; S. C. 1 Sid. 167; S. S. 1 Keb. 553; 12 Mass. 157, S. P.

(b) *Chandler v. Thompson*, 3 Campb. 82; *Moore v. Rawson*, 3 B. & C. 332.

(c) *Lawrence v. Qbee*, 3 Camp. 514; *Corning v. Gould*, 16 Wend. 531; *Crabb on R. P.* §§ 459, 460.

(d) 2 Roll. Ab. 140; Bac. Ab. Action on the Case, D.

(e) *Eden on Inj.* 268-9; *Story on Eq.* § 926; *J. Smith's Ch. Pr.* 593.

*1st. Of drain.*

1625. The right of drain, *jus aqueductus*, is an easement which gives the owner of land the right to bring down water, through or from the land of another, either from its source or from any other place.

When the source or spring from which the water is drawn fails, and becomes dry, the easement of course cannot be exercised, but, unlike a personal right, which once suspended is gone forever, when the water returns, the right to the easement is revived.

*2d. Of drip.*

1626. In the description of land, we have said that it extended downward to the centre of the earth and upward to the sky; to build a house adjoining your neighbor, and to make the roof so far extend over his ground that the rain water which falls on your roof descends on his ground, would be an infringement of that right, but he might have granted to his neighbor the right to let such water fall upon his ground, or the neighbor might have acquired such right by lapse of time.(a)

The right of drip, *jus cloacæ*, is an easement by which the water which naturally falls on the house of one is allowed to fall upon the land of another.(b) This arises in consequence of the right to project over in building, *jus projiciendi et protegendi*. This may be, by letting the water drop from the roof naturally on the ground, or by means of water spouts: *servitus stillicidii et fluminis*.

The civil law contains many reasonable provisions on the subject of these easements or servitudes; the owner of the dominant estate may lessen the burden of the servient inheritance; but he can never increase it without the consent of its proprietor; he may raise

(a) See 1 Roll. Ab. 107; 2 Roll. Ab. Nusans, G. pl. 11.

(b) Dig. 8, 1, 7.

his house and his water spouts, because that elevation renders the servitude less onerous; but he cannot lower them, because that would make the servitude more inconvenient. He cannot increase the surface of his roof, nor permit the water from neighboring roofs to increase that which naturally falls on his own.(a)

### 3d. Of support.

1627. The right of support, *oneris ferendi*, is the name of an easement, by which the wall or pillar of one house is bound to sustain the weight of the building adjoining.

A right somewhat similar, called by the civilians *tigni immittendi*, is the right of inserting a beam or timber from the wall of one house into that of a neighboring house, in order that it may rest on the latter, and that the wall of the latter may bear the weight.(b)

The owner of the servient building is bound, in both cases, to repair and keep it sufficiently strong for the weight it has to bear.(c)

"Where there has been no party wall," says Chancellor Kent,(d) "but the walls of the house pulled down stood wholly on its lot, yet if the beams of the other house rested upon the wall pulled down, and had done so for a period sufficient to establish an easement, by prescription, the owner of the adjoining house would be entitled to have his beams inserted for a resting place in the new wall."

### 3. Of ways.(e)

1628. The easement in ways will be considered by

(a) Dig. 8, 2, 20, 5; Dig. 8, 3, 29.

(b) Dig. 8, 2, 36; Dig. 8, 5, 14.

(c) Dig. 8, 2, 23.

(d) 3 Kent, Com. 437, 4th ed.

(e) See generally 4 Vin. Ab. 502; Bac. Ab. h. t.; Com. Dig. Chemin Egremont on Highways; Wellbeloved on Highways; Woolrich on Ways Dane's Ab. Index, h. t.

taking a view, 1, of the right to public ways; 2, of private ways; 3, of ways of necessity.

1° *Of public ways.*

1629. A *public* highway is a passage through the country, or some part of it, by which there is a right given to all the community to pass over the land of another. It is established either by law or by the act of the owner of the land over which such public road passes.

1st. *How established.*

1630. When it is established by law, as where it is opened under the direction of a legislative act, it is, in general, unlimited as to its use, and all the community may pass and repass with or without cattle, provided, that in so doing, they do not infringe on the provisions of the laws regulating roads.

But when such roads are laid out by the owner of land, he may annex what *limitations* or *conditions* he pleases to the grant. When there are no limitations, the public may use it in the same manner as one laid out by public authority. In general the owner of the land over which a way has been laid out, remains the owner of every thing except the easement due to the public. He is therefore entitled to the grass or trees, or fruit which grow at the sides of the highway,<sup>(a)</sup> and to all mines and minerals below the surface.<sup>(b)</sup>

1631. The grant of the way may be expressly by *deed*, or it may arise from the *acts of the owners* of the land, by dedicating the road to public use, by throwing it open for that purpose, no other formality being requisite, though in fact there be no specific grantee

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(a) 16 Mass. 366.

(b) 1 Roll. Ab. 392, l. 5; Com. Dig. Chemin, A 2; Bouv. L. D. Road; Kent, Comm. 433, n.

*in esse* at the time to whom the fee could be conveyed.(a)

What will amount to such a *dedication* depends somewhat upon circumstances. As to lapse of time since the public began to use the way, it has been held that eight, or even six years, without impediment, is evidence from which a dedication to the public may be inferred.(b)

But it must be remembered that he who dedicates the way to the public *must have a fee*; a tenant for years, though it be ninety-nine years, cannot dedicate a way to public use, to the injury of the reversioner.(c) He cannot grant by his license any greater right than he possesses.

#### 2d. How public ways are used.

1632. A public way may be used by the public at all times and in any manner not calculated to destroy the road, nor forbidden by local public regulations. When the way becomes impassable, as by a flood, or if it be out of repair, it is lawful for a traveller to go upon the adjoining land, doing as little damage as possible, and in such case such adjoining land becomes a temporary way.(d) This right, which is given from public policy, is confined to a public way; one having a right over a private way, cannot go over the adjoining land because such private way is muddy and impassable. The reason assigned for this is, that

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(a) *Town of Pawlet v. Clark*, 9 Cranch, 292; *Brown v. Manning*, 6 Ohio, 303; *City of Cincinnati v. White*, 6 Pet. 431.

(b) *The Trustees of Rigby Charity v. Merryweather*, 11 East, 375, n.; *Young v. Garland*, 6 Shep. 409. See *The State v. Marble*, 4 Iredell, 318; *Valentine v. Boston*, 22 Pick. 75; *The State v. Hunter*, 5 Iredell, 369; *Williams v. Cummington*, 18 Pick. 312; *Matter of 29th street*, 1 Hill, 189; *Opening of 39th street*, 1 Hill, 191; *Taylor v. Bailey, Wright*, 646; *Esling v. Williams*, 10 Penn. St. R. 126.

(c) *Wood v. Veal*, 5 Barn. & Ald. 454.

(d) *Young v. —*, 3 T. R. 263; *Dougl.* 749.

perhaps the person having a right of way is bound to repair it.(a)

### 3d. *Kinds of public ways.*

1633. Public ways are of various kinds, the principal of which are the following:

1. *Public ways*, such as have been already mentioned as being established by public authority or by grant or dedication to public use.

2. A *public passage* is the same as a public highway, with this difference only, that as the one is a right to pass over the *land* of another, so the other is a privilege of crossing his *water*, or if the water is a running stream, then, perhaps more accurately speaking, over his land covered with water.(b)

3. A *public quay*, like a public highway, is common to the whole community.(c)

4. Lord Coke, adopting the civil law in this respect, says there are three kinds of ways, namely: 1, a foot way, called *iter*; 2, a foot way and horse way, called *actus*; 3, a cart way, which contains the other two, called *via*.(d)

### 2° *Of private ways.*

1634. A *private right of way* is that private right which one man has of going over another's land; it is confined either to the inhabitants of a particular district, or to those occupying or owning certain estates, or it extends to one or more individuals in certain.

To every private way two requisites are essential; first, *the terminus à quo*, or the place from which the grantee is to set out in order to use the way; and the

(a) *Taylor v. Whitehead*, 745; *Henn's Case*, 3 Salk. 182, pl. 4.

(b) *Carth.* 193.

(c) *Bolt v. Stennett*, 8 T. R. 606. See *Mayor, &c. of New Orleans v. Gravier*, 11 Mart. R. 620.

(d) *Co. Litt.* 56 a; *Poth. Pand. lib.* 8, t. 3, s. 1; *Dig.* 8, 3; 1 *Bro. Civ. Law*, 177; *Crabb on R. P.* § 360—397.



*terminus ad quem*, the place where the way is to end.(a) Secondly, that the grantee have the right, and not a mere revocable license or permission of setting out from the *terminus à quo*, and his proceeding to and entering the *terminus ad quem*, for otherwise the privilege cannot be exercised, and the rule of law, that a grant which cannot take effect is void, would attach.

When a private right of way is an *appurtenance* to land, it will pass as a necessary incident belonging to it on a grant of the land. It can only be enjoyed with the estate to which it is annexed, it cannot be made over by itself to another.(b) If the right of way be in gross, or a mere personal right, it cannot be assigned to any other person, nor transmitted by descent. It being a mere personal right, it dies with him who is entitled to it.(c)

*1st. How a private right of way is established.*

1635. In general, the right to a private way is *established* by grant or prescription. When such a right is established in favor of a piece of land, and that is divided into several parcels, and sold to different individuals, each parcel, however small, is entitled to the right.(d) But this right cannot be extended to other land of the owner of the dominant estate, because that would increase the burden of the easement on the servient estate.(e)

*2d. How a private right of way is to be used.*

1636. When such a right is obtained by grant, it must of course be *used strictly according to the letter and*

(a) See *Miller v. Bristol*, 12 Pick. 550.

(b) See *Shepherd v. Watson*, 1 Watts. 35.

(c) *Finch's Law*, 17, 31; *Ham. N. P.* 195.

(d) *Watson v. Bioren*, 1 S. & R. 227; *Case of a private road*, 1 Ashm. 417.

(e) *Kirkham v. Sharp*, 1 Whart. 323; *Davenport v. Lamson*, 21 Pick. 72; *Jamison v. McCreedy*, 5 W. & S. 129.

*spirit of the instrument*, which shows the agreement between the parties; if the right is to pass on foot, and not with horses, the owner of the dominant estate cannot pass there with horses.

Difficulties arise as to the manner in which a private way is to be used, when the right has been obtained by prescription, which presumes a grant; for, in such case, the extent of the grant is uncertain. But if we remember that the possessor acquires nothing by prescription except what he has possessed, we shall be aided in our efforts to ascertain the rights thus acquired. It is a maxim, *tantum præscriptum, quantum possessum*; and the rule is founded on this, that prescription being an effect of possession, can have no greater extent than its cause, nor operate in any thing beyond it.

The right of going on foot is not that of going on horseback; the right to pass over a way on horseback is not that of going over it in a carriage; the right of passing during the day is not that of passing during the night; the right of passing at one season of the year is not that of passing at another; the right of passing for one object, as, for example, to gather your crop, is not the right of passing for another object. This divisibility of the different rights of easements, is almost infinite. If possession has been extended only to one of these modes of using a right, the prescription cannot be extended to any other mode. And as the claimant of the easement desires to establish a right, he must affirmatively show that his right to the easement covers the extent of his claim.

### 3° Of ways of necessity.

1637. When an estate is so surrounded by the lands of another that the owner cannot go to or from it, without trespassing upon his neighbors, the law confers on him a right of way, which is called a *way of necessity*;

that is, it gives him a right to pass over the land of his neighbor in order to get into the public highway. This is given upon a just indemnity, on principles of public policy, because the law will not suffer any property to be locked up and lie idle.(a)

*1st. In what case such an easement may be had.*

1638. Whenever land is *completely inclosed* by the lands of others, so that no access can be had to the public highway, a way of necessity may be claimed.(b) When the grantor of the inclosed lot owns the surrounding land, he is presumed to have granted it with a right of way, and consequently this claim will be easily established against him; but when he has sold all the surrounding ground, without reserving a way, which he might have done, he will still be entitled to such a way, even against his own grant, on the ground of public policy.(c)

To entitle the owner of the inclosed ground to a way of necessity, it must appear that he has no other way out.(d)

*2d. Extent of such easement.*

1639. A way of necessity, as the term implies, must be limited to what is *indispensable* to enable the owner of the inclosed land to go to the public highway; and, in general, it must be made where it will be the least injurious to the owner of the land,(e) consist-

(a) *Dutton v. Taylor*, 2 Lut. 1487; *Buckley v. Coles*, 5 Taunt. 311. See *Howton v. Frearson*, 3 T. R. 50.

(b) 2 Roll. Ab. 60, pl. 17, 18; 1 Wms. Saund. 323, (n.); *Ham. N. P.* 198; *Pernan v. Weed*, 2 Mass. 203.

(c) 2 Lutw. 1487; *Liford's Case*, 11 Co. 52; *Davey v. Askwith*, Hob. 234; *Jordan v. Attwood*, Owen, 121.

(d) *McDonald v. Lindall*, 3 Rawle, 495; *Allen v. Kincaid*, 2 Fairf. 156; *Lawton v. Rivers*, 2 McCord, 448; *Turnbull v. Rivers*, 3 McCord, 139; *Russell v. Jackson*, 2 Pick. 576; *Jetter v. Mann*, 2 Hill, S. C. R. 641.

(e) *Russell v. Jackson*, 2 Pick. 577; *McDonald v. Lindall*, 3 Rawle, 492.

ently with the right of the owner of the inclosed lot to have a convenient and reasonable mode of enjoying the premises.(a)

*Art. 3.—Easements, how extinguished.*

1640. According to the civilians, a servitude or easement may be extinguished or lost in several ways; the chief of which are the nine following: 1, by the extinction of the right of him who first established it; 2, by the extinction of the right of him to whom it is due; 3, by the destruction of the thing which is the subject of the servitude; 4, by the destruction of the thing to which it is annexed or due; 5, by the dereliction or abandonment of the thing which is subject to the servitude; 6, by the voluntary renunciation of him to whom the servitude is due; 7, by judgment or decree in an adversary suit or proceeding; 8, by confusion; 9, by commixtion.(b)

It should be observed, however, that the word *servitude*, in the Roman civil law, is of more comprehensive import than the common law term *easement*, and for this reason a discussion of the subject under these heads would include many matters which in this treatise properly fall under different titles. We shall therefore consider the subject under two divisions: 1, extinguishment by act of the party entitled to it; 2, by operation of law and fact.

*1. By act of the party entitled.*

1641. A man may release or relinquish, by a deed executed in due form of law, any right or interest which he may have in the lands or tenements of another person; and this power extends to easements as

(a) *Edgington v. Morris*, 3 Taunt. 31.

(b) These several methods are discussed in the *Répertoire de Jurisprudence*, by Merlin, (word *Servitude*,) in an article composed with great care, and also by Toullier in his *Droit Civil Français*, Vol. 3.

well as to other rights of property. It is a well established principle that an easement may also be lost by *non user*; by which we are to understand an absolute discontinuance of the enjoyment of it during the period of twenty-one (and in some of the states of twenty) years. Such a discontinuance of the use is a ground for presuming a release of the right by the party entitled to the enjoyment.(a)

The presumption, however, will not arise under all circumstances from the mere *non user* of an easement; but only in those cases where the owner of the land charged with the easement enjoys it in a manner inconsistent with the exercise of such a right; as by the erection of works(b) or structures of such a nature as would necessarily hinder the enjoyment of the easement. And the same, very nearly, is the doctrine of the civil law.(c)

## 2. By operation of law.

1642. In many cases, an easement may be extinguished by the union of the title to the land to which the easement is annexed with the title to the land it encumbers under one and the same ownership. But this principle does not apply to a way of necessity; for in this case, the right is merely suspended by the unity of ownership and possession while it exists.(d) Nor is the right to a *natural* water course extinguished by unity of title and possession. This results from the nature of the subject; indeed, from the necessity of the case, as was settled in *Shury v. Piggott*.(e)

(a) *Prescott v. Phillips*, 2 Evans' Poth. 136; *Lawrence v. Obce*, 3 Campb. Rep. 514; Bracton, l. 4, c. 38, § 3.

(b) Evans' Poth. 136; *Tyler v. Wilkinson*, per Story, J.; *White v. Crawford*, 10 Mass. Rep. 183.

(c) Dig. 8, 6, 5; Voet Com. ad Paud. l. 8, t. 6, §§ 5, 7; Toull. Droit Civil Français, tom. 3, n. 673.

(d) 1 Saund. Rep. 323, n. 6; 3 Mason, Rep. 276.

(e) 3 Bulst. 339.

and confirmed by Story, J., in *Hazard v. Robinson*.<sup>(a)</sup>

But the right to use water in a *particular* way, as by means of an aqueduct, may be effectually extinguished by the unity of title and possession of both the parcels of land, viz., of that benefited and that burdened by the easement. We shall only add, that whenever the adverse enjoyment is interrupted by unity of possession or otherwise, during the period of prescription, the acquisition of a right by *user* must commence *de novo*, as in cases where there has been no previous adverse enjoyment.

1643. The right to the use of air or light may be lost by abandonment or dereliction during a shorter period than twenty years, if the party entitled to the use, indicates at the time the intention never to resume the exercise of the right; as if he builds a solid and permanent blank wall to his house. But the cessation of the use must be absolute and unequivocal, and not under circumstances which indicate, or are consistent with the intention to resume the right at a future time; as where the owner of a house takes it down with the intention to rebuild another upon the same site. And this principle has been extended to a mill-site abandoned by the owner, evidently with the intention at the time, never to occupy it again for the same purpose. Such an abandonment would justify other riparian owners above and below in converting to a profitable use the natural advantages of their own lands for the same purpose.<sup>(b)</sup>

In these cases, it will be perceived, the law proceeds upon the ground of an equitable estoppel, and not upon the presumption of a release of the right, as in the case of *non user* during the period of prescription; inasmuch as it would be manifestly unjust to allow a party

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<sup>(a)</sup> 3 Mason, 276.

<sup>(b)</sup> See *Hatch v. Dwight*, 17 Mass. Rep. 289.

by a capricious exercise of rights seemingly abandoned to inflict a damage upon those who have reposed confidence in his acts, and expended labor or money upon the faith of them.

§ 2.—Of profits à prendre, or right of common.

1644. Having examined that class of incorporeal hereditaments which falls under the head of easements, it will be in order, next, to consider those which may be classed under the general head of *profits à prendre*, which are almost universally comprised under the term *common*.

By *common* is understood a right to take in common with the owner of the land, the whole or a part of its produce, whether such produce arises above or below the surface.(a) The commoner's right or interest, amounts to the privilege of taking the property of the grantor, who owns the estate burdened with the right of common, and no more.

The right of common is little known in the United States, yet there are some regulations to be found on the subject. The constitution of Illinois, for example, provides for the continuance of certain commons in that state.(b)

All unappropriated lands on the Chesapeake Bay, or on the shores of the sea, or of any river or creek, in the eastern parts of Virginia, ungranted and used in common, it is declared by a statute of that commonwealth shall remain so, and not be subject to grant.(c)

In most of the cities and towns of the United States, there are considerable tracts of land appropriated to public use. These commons were generally laid out with the cities or towns where they are found, either

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(a) As to Commons, see Bac. Ab. h. t. ; Com. Dig. h. t. ; Cruise on R. P. h. t.

(b) Const. art. 8, s. 8.

(c) 1 Virg. Rev. Code, 142.

by the original proprietors or early inhabitants for the use of the public.(a)

Commons are said to be chiefly of four sorts, namely: of pasture, of piscary, of turbary, and of estovers.

*Art. 1.—Common of pasture.*

1645. Common of *pasture* is the right of feeding one's beasts on another's land. It is either common *appendant*, common *appurtenant*, common *pur cause de vicinage*, or in *gross*.

It is proper to observe, before we proceed to the examination of these several kinds of common of pasture, that in general the right is to be enjoyed by a limited number of cattle; by beast *levant* and *couchant* upon the land to which the right is annexed, or by beast *commonable*.

By the expression cattle *levant* and *couchant* is properly meant as many beasts as may be fed with the produce of the land every day, taking one day with another, all the year round; or if the privilege is limited to a particular period, then throughout that period. The term *levant* and *couchant* literally means *rising up* and *lying down*.

The whole of the lands to which the right extends, or the lord's wastes, were liable to the commoner: by the statute of Merton, 20 Henry III., the lord was authorized to inclose such land as he had cultivated, or as the ancient law said, *approved*, provided he left a sufficiency for the beasts of the commoners.(b)

By *commonable cattle* are intended such, and such only, as either till or manure the ground. And by

(a) Commissioners of Bath v. Boyd, 1 Ired. 194; Carr v. Wallace, 7 Watts, 394. See Trustees, etc. v. Robinson, 12 Serg. & Rawle, 33; Bird v. Montgomery, 6 Mis. 510.

(b) 2 Bl. Com. 34. See Livingston v. Ten Broeck, 16 John. 14; Rotherham v. Green, Cro. Eliz. 593; Leyman v. Abeel, 16 John. 30; Watts v. Coffin, 11 John. 495.



*great cattle*, are meant all manner of beasts except sheep and yearlings.(a)

1. *Of common of pasture appendant.*

1646. A common of pasture *appendant*, is, in England, a right which the tenants of a manor have to depasture in the lord's wastes their commonable cattle, levant and couchant, upon the ancient arable land of their tenements. It is said to be of *common right*, to distinguish it from common arising by grant, because the privilege was originally conferred upon the tenants by the law itself to promote agriculture. This right is founded on prescription, and is regularly annexed to arable land, and cannot be severed from it.(b) It may be assigned, apportioned, suspended or extinguished.

1° *Of the assignment of a common of pasture appendant.*

1647. This right is *assignable*, and by assigning the land to which it is appendant, the right passes as a necessary incident to it.(c)

2° *Of the apportionment of a common of pasture appendant.*

1648. It may be *apportioned* by granting over a parcel of the land to another, either for the whole or a part of the owner's estate. If, in making such division, so small a portion of the land be granted that it will not require one of the commonable cattle to till or manure it, then all the common shall remain with the grantor.(d)

3° *Of the suspension and extinguishment of a common of pasture appendant.*

1649. This right may be suspended either altogether,

(a) Anon. 2 Roll. Rep. 173.

(b) *Bernett v. Reeve*, Willes. R. 227.

(c) 1 H. 4, M. 8, p. 5; 4 E. 3, M. 29, p. 46; 4 Co. 36.

(d) *Morse and Webb's Case*, 13 Co. 66; Willes, 227.

or perhaps for a part only. It may be partially extinguished by the tenant accepting in parcel of the waste an equal or greater interest than he has in the arable land, that is, by unity of possession.(a)

2. *Of common of pasture appurtenant.*

1650. Common *appurtenant* is a right of feeding one's beasts on the land of another, which right is founded on a grant, or a prescription, which supposes a grant.

1651. It is distinguished from common appendant in the four following particulars:

1. It is against *common right*, and must therefore be prescribed for, if claimed by prescription.(b) But where a grant exists it may be claimed by virtue of the grant, and user for fifty years is evidence from which to presume such a grant.(c)

2. It may be claimed as annexed to *any kind of land*, as not arising from any tenure.

3. It may be claimed for *any kind of cattle*, not merely for commonable beasts, or beasts of the plough, but for every kind of beast not commonable, as hogs, goats, geese, etc.

4. It may be commenced by *grant* within time of memory, and may be severed from the land to which it is appurtenant.

In most other respects commons appendant and appurtenant agree.

3. *Of common per cause of vicinage.*

1652. Common, *because of vicinage*, or neighborhood, is the right which the inhabitants of one or more townships or vills, which lie contiguous with each other, have of intercommoning with each other, as

(a) See *Livingston v. Ten Broeck*, 16 John. 14.

(b) *Tyrringham's Case*, 4 Co. 37.

(c) *Cowlan v. Slack*, 15 East, 108.

they had formerly done. This common is appendant only, inasmuch as it must be by prescription.(a)

4. *Of common in gross.*

1653. A common in *gross*, or at large, is such as is neither appendant nor appurtenant to land, but is annexed to a man's person.(b)

*Art. 2.—Of common of piscary.*

1654. Common of *piscary* is the right to fish in another's pond, pool, river, or other water. This species of common, like the others, may be appendant, appurtenant, or in gross.

*Art. 3.—Of common of turbary.*

1655. Common of *turbary* is the right to dig turf upon another's land. It may be appendant or appurtenant, or in gross; but it cannot be appendant to *land*, because turves are to be spent in the *house*.(c)

This, unlike common of pasture, which is a mere right to feed cattle on the herbage, is a right of carrying away the soil itself. To this is nearly allied another common, namely, the liberty of digging for coals, stones, and minerals.(d)

*Art. 4.—Of common of estovers.*

1656. Common of *estovers* is the right of taking the necessary wood for the use or furniture of a house or farm, from the land of another.

It will be proper to consider, 1, their different kinds; 2, how the right is acquired; 3, what things may be taken; 4, the time of taking; 5, how the right is to be used.

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(a) 4 Co. 38.

(b) 2 Bl. Com. 34.

(c) 4 Co. 38.

(d) 1 Inst. 122 a; 4 M. & S. 474.

*1. Of the different kinds of estovers.*

1657. When considered as to the use to which they are applied, estovers may be distinguished into four kinds, namely: house-bote, that is, wood for the necessary repairs of the house; fire-bote, or wood for consuming as fuel in the house; plough-bote, or wood for the repairs of ploughs and other implements of husbandry; cart-bote, for the repairs of carts and wagons; and hay or hedge-bote, for the repair of hedges or fences. The word *bote* is used synonymously with the word estovers.

When examined as to the manner by which the title is acquired, common of estovers is either appendant or appurtenant; but as such common of estovers must be used in a house, it cannot be common in gross.

*2. How the right to estovers is acquired.*

1658. This right can be claimed only by grant or prescription, and if a grant be shown, it will then be appurtenant; if it be appendant, it is of common right. But as estovers is a profit *à pendre*, it cannot be claimed by custom.

*3. What things may be taken for estovers.*

1659. The commoner as a general rule may take only underwood, loppings, etc., but this right may by prescription be much enlarged and extend to other wood.

*4. Of the time of taking estovers.*

1660. This may be varied according to the usage of different manors, or throughout the year, except in farming time, and it may be also subject to other conditions as to time.

*5. Of the user of the right of estovers.*

1661. It is an invariable rule that estovers must be spent on the premises which give the right to take them; and if to be used for repairs, they cannot be appropriated to other purposes. This privilege being once attached to a house, cannot be severed from it; therefore, if the owner of the house grant the estovers to another reserving the house to himself; or grant the house to another and reserving to himself the estovers, the latter shall not thereby be severed from the house, because they must be spent on it.(a)

## § 3.—Of rent.(b)

1662. The third kind of incorporeal inheritance is *rent*, which is a certain profit in money, provisions, chattels, or labor, issuing out of lands and tenements in retribution for the use.(c)

A rent somewhat resembles an annuity; their difference consists in the fact that the former issues out of lands, and the latter is a mere personal charge.

This head will be divided into two articles: 1, of the different kinds of rent; 2, how rents are created or reserved.

*Art. 1.—Of the different kinds of rent.*

1663. At common law there were three kinds of rents, namely: rent service, rent charge, and rent seck.(d)

1. When the tenant held his land by fealty, or other corporeal service, and a certain rent, this was

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(a) Plowd. 381.

(b) See, as to Rents, 2 Bl. Com. 41; Gilb. on Rents; Co. Litt. 142, a; Com. L. & T. 95; Bradb. on Distr. 24; Bac. Ab. h. t.; Crabb on R. P. § 149—258.

(c) Gilb. on Rents, 9; Beaver v. Hartley, 11 Penn. St. R. 254, 256.

(d) Co. Litt. 142 a, sec. 213.

called *rent service*; a right of distress was inseparably incident to this rent.

2. When the rent was created by deed, and the fee granted, it was called a *rent charge*; and as there was no fealty annexed to such grant of rent, the right of distress was not an incident. It required an express power of distress to be annexed to the grant, which gave it the name of a rent charge, because the lands were, by the deed, charged with a distress.<sup>(a)</sup>

3. A *rent seck*, or a dry or barren rent, was rent reserved by deed, without a clause of distress; and in a case in which the owner of the rent had no future interest or reversion in the land, he was driven for a remedy to a writ of annuity, or a writ of assize.

But the statute of 4 Geo. II., c. 28, abolished all distinction in the several kinds of rent, so far as to give the remedy by distress in cases of rent seck, rents of assize, and chief rents, as in the case of rent reserved upon a lease.

4. A *fee farm rent* is a perpetual rent reserved on a conveyance in fee simple. The deed usually contains a reservation of the rent, accompanied by a power of distress and reëntry on non-payment. In Pennsylvania a rent of this description is called a *ground rent*; <sup>(b)</sup> in Massachusetts, a *quit rent*; and in New York and New Jersey, a *rent charge*. In this case,

<sup>(a)</sup> Co. Litt. 143, b.

<sup>(b)</sup> *Ingersoll v. Sergeant*, 1 Whart. 337; *Franciscus v. Reigart*, 4 Watts, 98. The Emphyteosis of the civil law much resembles a ground rent; it was a contract by which the owner of an uncultivated piece of land granted it to another, either in perpetuity, or for a long time, on condition that he should improve it by building, planting, or cultivating it, and pay for it an annual rent; with a right in the grantee to alienate it, or transmit it by descent to his heirs, and under a condition that the grantor shall never reënter as long as the rent is paid to him by the grantee or his assigns. Inst. 3, 25, 3; 3 Duvergier, n. 154; Faber de Jure Emphyt. Definit. 36; Code 4, 6, 11. In Louisiana such a rent is called a *rente foncière*. It is a rent which issues out of the land, and it is of its essence that it be perpetual, for if it be for a limited time, it is a lease. It may, however, be extinguished. Civ. Code of Lo. art. 2750. See Pothier, h. t.

although the landlord has no reversionary interest, still he has a right of distress.

*Art. 2.—How rents are created or reserved.*

1664. This article will be divided into six heads: 1, by what words a rent is created; 2, to whom the reservation may be made; 3, upon what form of contract rent may be reserved; 4, out of what things; 5, of the payment of the rent; 6, of the remedies for the recovery of rent.

1. *By what words.*

1665. The creation of rent, or the manner in which it is reserved, may be considered with respect to a rent service or to a rent charge.

1. A rent service, as we have seen, is a retribution for the land demised, and it must be reserved by such words as imply a return of something which was not in the grantor before, in lieu of the use of the land given, and it is properly reserved by the words *reserving, rendering, yielding and paying*; (a) but if the words of the deed reserve to the lessor something which was at the time in his possession, it will not be a good reservation, as, for example *excepting or saving*. The thing reserved must be a *profit* issuing out of the land. The reservation may be of money, goods, provision, chattels or labor.

2. The usual way of creating a rent charge is, when a man who is seised of lands, by deed-poll or indenture, grants a yearly rent issuing out of the same land, to another in fee, in tail or for life, with a clause of distress. (b)

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(a) Platt on Cov. 50; Royer v. Ake, 3 Penn. 464; Co. Litt. 47 a; Gilb. on Rents, 30; Plowd. 142; Harrington v. Wise, Cro. El. 486; S. C. Moor, 459.

(b) Co. Litt. s. 218.

*2. To whom the reservation of rent may be made.*

1666. It is a general rule that the rent must be reserved to the feoffor, donor or lessor, or to his heirs, and it cannot be reserved to a stranger.(a) But a man may reserve a rent to himself for life, and a different rent for his heir, or he may reserve a rent to his heir, omitting himself.(b)

*3. Upon what form of contract rent may be reserved.*

1667. The most usual mode of reservation of rents is on leases; these may be in writing under seal, or not under seal, or upon parol leases, not in writing. These last leases are generally good only for a limited time. By the English statute of frauds,(c) it is declared "that all leases, estates and terms of years, or any uncertain interest in lands, created by livery only or by parol, and not put in writing and signed by the party, should have the force and effect of leases or estates at will only, except leases for the term of three years, whereupon the rent reserved during the term shall amount to two-third parts of the full value of the thing demised." The principles of this statute have been adopted, with some modifications, in nearly all the states of the Union.

Rent may also be reserved upon every conveyance that either passes an estate to the tenant, or enlarges an estate already in him; but where no estate passes, there ought to be no rent, the rent being a retribution for something given.(d)

*4. Out of what things rent may be reserved.*

1668. As a general rule, rent must issue out of such

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(a) Co. Litt. 143 b; Gilb. on Rents, 45; Ege v. Ege, 5 Watts, 134; Oates v. Frith, Hob. 130.

(b) Co. Litt. 213.

(c) 29 Car. II., c. 3, ss. 1, 2 and 3.

(d) Gilb. on Rents, 26; 2 Roll. Ab. 449.



an inheritance as that on which an entry may be made and a distress taken.(a) No rent can therefore be reserved as issuing out of an incorporeal hereditament, or thing lying in grant, because to such things no recourse can be had for a distress.(b) But when this reason ceases, and, at a future time, the right of distress may be exercised, rent may be reserved out of an incorporeal hereditament; as, for example, reversions and remainders are incorporeal hereditaments, and can pass only by grant, yet a rent may be reserved upon them, although the grantor has no remedy for them during the continuance of the particular estate, yet there will be a remedy by distress when he comes into possession.(c)

Though rent cannot issue out of a personal chattel, yet if an estate is let together with personal chattels, the rent may be reserved for the whole.(d)

#### 5. *Of the payment of rent.*

1669. Under this head will be considered, 1, the time of payment; 2, when the rent is payable; 3, to whom it is payable; 4, by whom rent is payable.

#### 1° *Time of payment of rent.*

1670. In considering the time when rent ought to be paid, we will examine, first, on what days it becomes due; and, secondly, at what part of the day it is demandable.

#### 1st. *Of the days of payment of rent.*

1671. The *days* of payment are generally fixed by the parties, in the lease or other instrument. When

(a) Co. Litt. 47. a.

(b) Co. Litt. 142, a.

(c) Capel's Case, 1 Co. 62, b; Co. Litt. 47, a; Gilb on Rents, 24.

(d) Newman v. Anderton, 2 N. R. 226. See Newton v. Wilson, 3 Hen. & Munf. 470; Mickie v. Wood, 5 Rand. 574.

special days are limited by the *reddendum*, the rent must be limited according to the *reddendum*, and not according to the *habendum*; the computation according to the *habendum* takes place only when the *reddendum* is general, that is, yielding and paying quarterly so much rent.(a)

But when the parties have not appointed any particular day, a time is fixed by law, according to the intention of the parties.(b) If, for example, a lease should be made on the first day of January, and the rent should be made payable the first day of January and of July, the rent would be payable the first day of July following, for it was evidently the intention of the parties that rent should be paid half-yearly from the date of the letting.(c) And if no time be stated for the payment of the rent in a lease for a year, it is clear, as the contract is entire, that the rent is not due till the end of the year.(d)

Rent may be made payable in advance, but then it must be specified clearly; for where a house was let at a yearly rent, payment to commence on a particular day, and to be paid three months in advance, such advance to be paid on taking possession, it was held that this advance was to be confined to the first quarter only; for if it had been the intention of the parties to make it payable in advance, it ought to have been said, "always payable in advance."(e)

2d. *At what time of day the rent is due.*

1672. As to the *time of the day* when the rent becomes due, it is proper to observe this distinction. It becomes due, for the purpose of making a demand to

(a) *Tompkins v. Pinsent*, 2 Ld. Raym. 819; S. C. 1 Salk, 141.

(b) *Gilb. on Rents*, 48; *Co. Litt.* 217.

(c) See *Hill v. Grange*, *Plowd.* 171.

(d) *Menough's Appeal*, 5 Watts & S. 432; *Boyd v. McCombs*, 4 Penn. St. R. 146.

(e) *Holland v. Palser*, 2 Starkie, 161.

take advantage of a condition of reëntry, or to tender it to save a forfeiture, at sunset on the day on which it is due; but it is not actually due till midnight for any other purpose.(a) A payment before midnight would be considered a voluntary payment, and the party entitled to receive it would not be bound by such payment, made to a person not entitled at the time it ought to have been paid; for if the lessor died before midnight, the rent would go to his heir.(b) As between the original parties themselves, the landlord could not maintain an action commenced on the day the rent became due, although it might have been commenced after sunset.(c)

2° *Where rent is payable.*

1673. When rent is payable yearly, and it is so reserved, it is to be paid on the land, unless otherwise agreed upon, for the land is the debtor.(d)

3° *To whom the rent is payable.*

1st. *Whether to the heir or executor.*

1674. Questions frequently arise, between the executor and the heir of the lessor, as to who is entitled to receive the rent. As a general rule, the rent which becomes due before the lessor dies belongs to his executor, and that which becomes due after, to his heir. It is when the lessor dies on the day when the rent is payable, that the question arises. It has already been said that for certain purposes rent becomes due at sunset, but as between the heir and executor, if the lessor died after sunset, the former would be entitled to the

(a) *Duppa v. Mayo*, 1 Saund. 287; S. C. 2 Salk. 578.

(b) 1 Saund. 287. But it seems such payment would be good against the heir. See *Clum's Case*, 10 Co. 127; *Brownl.* 106; *Rockingham v. Penrice*, 1 P. Wms. 177.

(c) See *Bank v. Wise*, 3 Watts, 401; *Wood v. Partridge*, 11 Man. 493.

(d) Co. Litt. 201, b.; *Walter v. Dewey*, 16 John. 222; *Burrough's Case*, 4 Co. 73; *Hutt.* 115.

rent. But it must be remembered that this rule applies only to the case of a lease made by a lessor seised in fee, or made by one under a power; in the case of a tenant for life, it is different.

In two cases it has been held that the executor of a tenant for life would be entitled to the rent, although the lessor died before it was due; as where A granted a rent charge to B, payable at Lady-day and Michaelmas, and B died on Michaelmas day after sunset, it was held that as B lived till after sunset, which was the legal time for demanding the rent, though he died before twelve o'clock at night, it should go to the executor. (a) Again, where A, a tenant for life, remainder to his wife for life, made a lease reserving rent at Lady-day and Michaelmas day, and died on the latter day at about twelve o'clock at noon, his administrator was held entitled to this rent. (b)

The reason assigned by the court in these cases is this, that there is a difference between a rent incident to a reversion, which must go somewhere, if not to the executor, then to the heir, and where the rent can go nowhere, unless to the executor; in this latter case, if the lessor had lived to the beginning of the day, at which a voluntary payment might be made, this would be sufficient to entitle the executor or administrator to the rent, rather than it should be lost.

1675. By virtue of the English statute, 11 Geo. II., c. 19, s. 15, the principles of which have been reenacted or adopted in this country with some modifications, when a tenant for life dies during the currency of a quarter or year, or other definite duration of time, when the rent is payable, it shall be apportioned to the day of his death.

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(a) 1 Saund. by Wms. 288, n. (17); *Ballasis v. Cole*, cited in *Rockingham v. Penrice*, 1 P. Wms. 178.

(b) *Clum's Case*, 127, b.

When the land is sold by virtue of judicial proceedings, the rent is apportioned.(a)

*2d. To joint tenants.*

1676. Joint tenants have each of them an estate in *every part of the rent*, each may therefore demand and receive the *whole* of the rent due, and give a discharge for it, and such a discharge is binding on his companions.(b)

*3d. To tenants in common.*

1677. Unlike joint tenants, tenants in common do not hold by one title and by one right, but by different titles, and they have *several estates*; each is therefore entitled to receive his proportion of the rent,(c) unless, indeed, the thing to be paid for rent be an entire thing, as to render a horse, in which case the thing being incapable of division, it must be paid to them jointly.(d)

*4th. When the reversion or right to receive the rent has been assigned to several.*

1678. When there is a subsisting obligation on the part of the tenant to pay a certain rent, the reversioner may sell his estate in different parts, to as many persons as he may deem proper, and the lessee or tenant will be bound to pay each a proportion of the rent.(e) The rule is the same when the lessor devises the rent to different persons in parts, as where a testator owned a rent for thirty dollars, and he devised it to his three sons, one-third to each, it was held that each was entitled to his share, for which he might maintain an action.(f)

(a) 3 Kent, Com. 470, 4th ed

(b) 3 Salk. 17; Robinson v. Hoffman, 4 Bing. 562; S. C. 3 C. & P. 234; 1 M. & P. 474.

(c) Harrison v. Barnby, 5 T. R. 246.

(d) Co. Litt. 197, a.

(e) Bank of Pennsylvania v. Wise, 3 Watts, 404; Farley v. Craig, 6 Halst. 262; Nellis v. Lathrop, 22 Wend. 121.

(f) Ards v. Watkins, Cro. Eliz. 637.

Where the reversioner or owner of the rent releases a part of it to the tenant, he is entitled to receive the rest.(a)

It is usual for the grantees to agree among themselves as to what part of the rent each shall have, when there is nothing said in the grant as to the proportion to which each is entitled; in case of disagreement, the apportionment is to be made by the jury, who, upon evidence offered, are to judge of the value of the land purchased by the lessor, or aliened by the tenant.(b)

*5th. How far the landlord's or lessor's right to receive the rent is affected by his acts or the acts of others.*

1679. The right of the lessor to rent may be suspended, 1, by his tortious acts; 2, by his neglect to repair; 3, by the destruction of the premises; and, 4, by eviction of the tenant.

*(1.) How far lessor's right is suspended in consequence of his tortious acts.*

1680. It is evidently unjust on the part of the lessor wrongfully to deprive the lessee of the thing let, and at the same time to claim the rent. Where the lessor, therefore, enters wrongfully into the demised premises, and the lessee is *evicted* from part of the same,(c) the tenant is discharged from the payment of the whole rent, till he be restored to the whole possession,(d) for the lessor ought not to be able so to apportion his own wrong as to oblige the tenant to pay any thing for the residue.(e) When the entry

(a) *Farley v. Craig*, 6 Halst. 263. See *Ingersoll v. Sergeant*, 1 Whart. 337.

(b) See *Hodgkins v. Robson*, 1 Vent. 276; *Cuthbert v. Kuhn*, 3 Whart. 366; *McElderry v. Flannagan*, 1 Har. & Gill, 308; *Pallet's Case*, Brownl. 186.

(c) *Dyott v. Pendleton*, 8 Cowen, 730; *Vaughan v. Blanchard*, 1 Yeates, 175; 4 Dall. 124.

(d) *Lewis v. Payn*, 4 Wend. 423.

(e) *Smith v. Raleigh*, 3 Campb. 513; *Briggs v. Hale*, 4 Leigh, 484; 1 Roll. Ab. 940.

is lawful, particularly when authorized by the tenant himself, the rule is otherwise, and the rent shall be apportioned.(a)

Any other act of misconduct by the landlord which justifies the tenant to leave the premises, will deprive the lessor of the rent after such act.(b)

1681. A *mere trespass* by the landlord will not, however, suspend the right to the rent.(c) But when the trespass has been an interference with, or disturbance of the tenant's beneficial enjoyment of the premises, intentionally committed by the landlord, and injurious in its character, it operates as a suspension of the tenant's liability to pay the rent, although there has been no physical eviction or expulsion.(d)

(2.) *How far lessor's right is suspended in consequence of his neglect to make repairs.*

1682. Though in general the lessor is not bound to make repairs, yet if the tenant be exonerated from making them, and the premises become unsafe or unwholesome for want of them, a tenant from year to year may quit without previous notice, and he will not be liable for any rent after the occupation has ceased to be beneficial to him.(e) But where the lease was for a term of years, with no agreement by the lessor to repair, and in the same writing the lessee agreed to pay a certain rent, and the property leased, (a wharf,) before entry by the tenant, was destroyed by natural decay, the lessee was held liable for the rent agreed to be paid.(f)

(a) *Hodgkins v. Robson*, 1 Vent. 176; *Vaughan v. Blanchard*, 1 Yeates, 176; *Franciscus v. Reigart*, 4 Watts, 116.

(b) *Kirkham v. Jarvis*, 7 D. P. C. 678.

(c) *Bennett v. Bettle*, 4 Rawle, 339.

(d) *Cohen v. Dupont*, 1 Standf. Sup. C. Rep. 260.

(e) *Collins v. Barrow*, 1 Mood. & Rob. 112. See *Fairman v. Fluck*, 5 Watts, 517.

(f) *Hill v. Woodman*, 2 Shep. 38.

(3.) *When destruction of the premises will suspend the lessor's right to the rent.*

1683. When there is an *express* covenant on the part of the lessee that he will pay the rent, he is bound to do so, although there may be a total or partial destruction of the premises, because a man is held bound by his contract, and he ought to have provided against such accidents, by making an exception in such cases; (a) nor does the fact that the landlord was fully insured, where the destruction was by fire, (b) alter the case. He will not be protected even by a court of equity. (c) The reason assigned for this is, that the tenant loses his term, and the lessor the residue by the accident, and that therefore the rule *res perit domino suo*, applies in such case. (d)

(4.) *When the tenant is evicted from the premises.*

1684. If the tenant is *evicted* from the whole of the premises *by a title paramount*, he is not liable for any rent which is not then due, for the obligation to pay ceases when the consideration for it ceases, namely, the enjoyment of the land. The rent which was due before the eviction, however, must be paid. (e)

When the eviction by title paramount is only partial, the rent becomes apportionable, and the eviction is a bar *pro tanto*. (f)

If the eviction of the whole or of a part be *by the lessor*, the rent is suspended for the whole, and the lessor can claim nothing until he has restored the

(a) *Paradine v. Jane*, Al. R. 26; *Hallet v. Wylie*, 3 John. 44; *Baker v. Holtzapfell*, 4 Taunt. 45; *Pollard v. Shaeffer*, 1 Dall. 210; *Wagner v. White*, 4 Har. & J. 564.

(b) *Magaw v. Lambert*, 3 Penn. St. R. 444.

(c) *Holtzapfell v. Baker*, 18 Ves. 115; *Hare v. Grove*, 3 Anst. 687; *Lamott v. Sterret*, 1 Harr. & John. 42.

(d) *Story*, Eq. Jur. § 102; *White v. Molyneux*, 2 Kelly, 124.

(e) *Kessler v. Conachy*, 1 Rawle, 442; *Hemphill v. Eckfeldt*, 5 Whart. 278.

(f) *Stevenson v. Lambard*, 2 East, 576; 2 Wend. 561; *Cuthbert v. Kuhn*, 3 Whart. 357.



premises to the tenant.(a) But a mere trespass will not have that effect.(b)

4° *By whom rent is payable.*

1685. The *lessee* by entering into a contract to pay the rent is always liable for it, notwithstanding he may assign all his rights to another,(c) because the privity of contract is not discharged.

1686. But when an *assignee* takes the lease, there is no personal covenant on his part to pay the rent, and he is responsible for it, only as respects the land. When he sells the lease which he bought, his responsibility ceases as to all future rents, because then there is no privity between him and the lessor.

An executor is liable for rent accrued during the lifetime of his testator, whether he were the original lessee or an assignee, and the assets in his hands must be applied to discharge such rent. For rent accrued after the testator's death, he is responsible, where the testator was the original lessee, and became personally bound to pay the rent. If, however, the testator was a mere assignee, the executor may refuse to accept the property, if he has not sufficient assets to pay the rent.(d)

6. *Of the remedies for the recovery of rent.*

1687. The usual remedies are those by distress, by reentry, and by action; their consideration will be deferred until we come to treat of remedies.

§ 4.—Of annuities.(e)

1688. Having taken a view of rents, the next object

(a) 1 Saund. 202, 204, n. 2; Bennett v. Bittle, 4 Rawle, 339; Dyott v. Pendleton, 8 Cowen, 730.

(b) Lansing v. Van Alstine, 2 Wend. 561; 4 Rawle, 339.

(c) Eton v. Jacques, 2 Doug. 455.

(d) Reid v. Ld. Tenterden, 4 Tyrw. 111.

(e) See generally, as to annuities, Bac. Ab. Annuity and Rent; Com. Dig. Annuity; Doct. Pl. 84; 1 Rep. on Leg. 588; Dane's Ab. h. t.; Viner's

of our consideration, as an incorporeal hereditament, is an annuity. An *annuity* is a yearly sum of money granted by one party to another, in fee, for life or years, charging the person of the grantor only.(a) In a less technical sense, however, when money is chargeable on land and on the person, it is generally called an annuity.(b)

An annuity is not unfrequently confounded with a rent charge, but they differ in this: a rent charge is a burden imposed upon and issuing out of *lands*, whereas the annuity, technically speaking, is chargeable only upon the person of the grantee.(c)

Annuities are usually classed with incorporeal hereditaments, because, when agreed to be paid to the annuitant and his heirs, it is a personal fee, and transmissible by descent like an estate in fee.(d)

An annuity may be created by deed or by will.

1689. Difficulties occur frequently, in consequence of the obscurity of the instrument creating the annuity, as to the time when it is to commence. The following rules have been adopted in relation to the subject:

1. When the time is distinctly stated, the annuity must of course be paid at that time.

2. When the testator directs the payment to be made at the end of the first quarter, or other period, before the expiration of the first year after his death, it is then due; but in fact it is not payable by the executor till the end of the year.

3. When the time is not appointed, as frequently happens in wills, the following distinction is presumed to exist. If the bequest be merely in the form of an

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Ab. Annuity. Provisions are contained in the civil code of Louisiana in relation to a peculiar kind of annuities known in that state. Art. 2764, et seq.

(a) Co. Litt. 144; 1 Lilly's Reg. 89; 2 Bl. Com. 40; 5 Mart. R. 312.

(b) Doct. & Stud. Dial. 2, 230; Roll. Ab. 226. See *Horton v. Cook*, 10 Watts, 127.

(c) Bac. Ab. Annuity, A.

(d) Co. Litt. 2 a.

annuity, as a gift to a man of "an annuity of one hundred dollars for life," the payment will be due at the end of the year after the testator's death. But if the disposition be of a sum of money, and the interest to be given as an annuity to the same man for life, the payment will not accrue till the end of the second year after the testator's death. The reason seems to be this, because the executor is entitled to hold the money for the first year, without being charged with interest. This distinction, though stated from the bench, does not appear to have been sanctioned by express decision.(a)

§ 5.—Of franchises.(b)

1690. A *franchise* is a certain privilege, conferred by grant from the government, and vested in individuals.(c) They are usually created for the public benefit, and not for the individual advantage of any one. The most common are the grant of a right or privilege of making roads, bridges, establishing ferries, and taking toll for the use of the same.

They are generally granted to corporations, but instances are not wanting where the grant is made to a man and his heirs, and then clearly the right descends, and the estate is an incorporeal hereditament. In cases of this kind there is an implied agreement on the part of the government not to annul the grant, unless for just cause.(d)

(a) *Gibson v. Bott*, 7 Ves. 96, 97.

(b) See as to Franchises, Cruise's Dig. tit. 27; 2 Bl. Com. 37; 3 Kent's Com. 458, 4th. ed.; Finch, 164; Crabb on Real Prop. § 623 to 732.

(c) 2 Bl. Com. 37. Franchise has another sense; it is a right reserved to the people by the constitution; hence we say the elective franchise, to designate the right of the people to elect their officers.

(d) See *Beekman v. Saratoga*, 3 Paige, 45; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420.

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**TITLE II.—OF THE ESTATE WHICH MAY BE HAD IN REAL PROPERTY.**

1691. After having taken a general view of the nature of real property, corporeal and incorporeal, it will now be proper to ascertain what estate may be had in the same. These estates are of two kinds, namely, legal and equitable.

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*Division 1.—Of legal estates.*

1692. A *legal estate* is one the right to which may be enforced in a court of law. It is distinguished from an equitable estate, which is grounded on the rules of courts of equity, and the right to which must necessarily be enforced in a court of equity. In the consideration of legal estates we will inquire into, 1, the quantity of the estate; 2, the time of their enjoyment; 3, the number and connection of the tenants.

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**CHAPTER I.—OF THE QUANTITY OF LEGAL ESTATES.**

1693. The word *estate*, in its most extensive sense, signifies every thing of which riches or fortune may consist, and includes personal and real property; thus we say personal estate, real estate. In its more limited and technical sense, it is applied to lands. It is used in two senses. The first describes and points out the land itself, without ascertaining the nature or extent of the interest in it; as “my estate in Philadelphia.” The second, which is the proper and technical meaning of estate, and the one in which it is here used, is the degree, quantity, nature and extent of interest which one has in real property; as, an estate in fee, whether the same be a fee simple or fee tail; or an estate for life, for years, etc.

In Latin, it is called *status*, because it signifies the condition or circumstances in which the owner stands with regard to his property.

The *quantity of interest* which a man has in his tenement is measured by its duration and extent. An estate, considered in this point of view, is said to be an estate of freehold, and an estate less than freehold. Freehold estates are again divided into estates of inheritance, and estates not of inheritance. Estates in fee are those of inheritance; those for life are not of inheritance.

This chapter will be divided into four sections: 1, of freeholds of inheritance; 2, of legal estates of freehold, not of inheritance; 3, of estates less than freehold; 4, of estates upon condition.

#### SECTION 1.—OF FREEHOLDS OF INHERITANCE.

1694. An estate of *freehold* is defined by Britton to be “the possession of the soil by a freeman.” This definition has been adopted by Blackstone.<sup>(a)</sup> But, unless the word *possession* be considered as synonymous with ownership, every tenant for years would be a freeholder. An estate of freehold may more fully be defined to be an estate in lands or other real property, held by a free tenure, for the life of the tenant or that of some other person; or for some uncertain period, or forever.

It is called *liberum tenementum*, frank-tenement or freehold; it was formerly described to be such an estate as could be created only by livery of seisin, a ceremony similar to the investiture of the feudal law. But since the introduction of certain modern conveyances, by which an estate of freehold may be created without livery of seisin, this description is not sufficient.

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(a) 2 Com. 104.

1695. There are two qualities essentially requisite to the existence of a freehold estate.

1st. Immobility; that is, the subject matter must be either land, or some interest issuing out of and annexed to land.

2d. A sufficient legal indeterminate duration; for if the utmost period of time to which an estate can last, is fixed and determined, it is not an estate of freehold. For example, if lands are conveyed to a man and his heirs, or for his life, or for the life of another, or until he shall be married, or go to Europe, he has an estate of freehold; but if such lands are limited to a man for one hundred or five hundred years, if he shall so long live, he has not an estate of freehold.(a)

1696. A *fee* is an estate in land which may continue forever. The word *fee* is explained to signify that the land, or the subject of property, belongs to its owner, and is transmissible, in the case of an individual, to those whom the law appoints to succeed him, under the appellation of heirs; and, in case of corporate bodies, to those who are to take on themselves the corporate function, and, from the manner in which the body is to be continued, are denominated its successors.(b)

By the English common law the true meaning of the word *fee* (*feodum*) is the same with that of *feud* or *fief*, and, in its original sense, it is taken in contradistinction to *allodium*. By *allodium* is meant an absolute estate of inheritance in contradistinction to a *feud*. Allodial lands were those of which the owner had the *dominium directum et verum*; the complete and absolute property, free from all services to any particular lord. *Allodium proprietatis quæ a nullo recognoscitur. Tenere in allodium id est in plenum et absolutam*

(a) Cruise on R. P. t. 1, ss. 13, 14, 15; Litt. § 59; Co. Litt. 42, a.

(b) Co. Litt. 471, b; 2 Bl. Com. 104 to 106; Wright on Ten. 147, 150.

*proprietatem. Habet integrum et directum dominium, quale a principio de jure gentium fuit distributum et distinctum.*(a) In this country, the title to land is essentially allodial, and every tenant in fee has an absolute and perfect title, yet in technical language his estate is called *an estate in fee simple*, and the tenure *free and common socage*. Remembering the sense in which these terms are used, it will be more convenient, as well as more intelligible, to employ the established technical language, to which we have been accustomed, than to adopt one with which we are not familiar.

In the sense in which it is now used in this country, a *fee* is an estate of inheritance in law, belonging to the owner of the land, and transmissible to his heirs.

One of the most essential requisites to a fee is, that the estate shall continue forever. An estate whose duration is limited by the period of one or more lives in being, is merely a *freehold*, and not a fee; for example, a limitation to Titius and his heirs, during the life or widowhood of Titia, is not an inheritance in fee, because the event must necessarily take place within the period of a life.(b)

Fees are divided into, 1, fee simple; 2, qualified or base fees; 3, conditional fees; 4, fees tail.

§ 1.—Of fee simple.

1697. A *fee simple* is a pure inheritance, and in reference to the ownership of individuals, is not restrained to any heirs in particular, nor subject to any condition or collateral determination, except by the laws of escheat, and the canons of descent, by which it may be qualified, abridged, or defeated.(c) The word fee

(a) Dumoulin, art. 46, n. 1.

(b) Chudleigh's Case, 1 Co. 140, b.

(c) Co. Litt. 1, 6; Plowd. 557; Hale's Analysis, 74.

simple is sometimes used by the best writers on law as contrasted with estates tail.<sup>(a)</sup> In this sense the term comprehends all other fees as well as the estate, which, in strict propriety of technical language, is properly distinguished by this appellation.

The law annexes to every estate and interest in lands, tenements and hereditaments, certain peculiar incidents, rights and privileges, which, in general, are so inseparably attached to those estates, that they cannot be restrained by any proviso or condition whatever.

1698. The several incidents of an estate in fee simple are the following :

1. The owner has an *unlimited power of alienation*; any restriction of this power, annexed to the creation of an estate in fee simple, would, therefore, be absolutely void.

2. This unlimited power of alienation comprises in itself *all inferior powers*; a tenant in fee simple, may therefore create any inferior estate or interest out of his own; as if one grant a lease for twenty-one years, the fee remains vested in him and his heirs, and, after the determination of the term, the land reverts to the grantor and his heirs, who shall hold it again in fee simple. When there is no one entitled to take the fee at the determination of the term, then the estate is said to be in *abeyance*, which word signifies in a figurative sense *to expect, to look for, to desire*, and the estate is said to be in expectation, remembrance or contemplation of law. For example, where an estate is limited to A for life, remainder to the right heirs of B, the fee simple is in abeyance during the lifetime of B, because it is a maxim of law, that *nemo est hæres viventis*.<sup>(b)</sup>

(a) Co. Litt. 19.

(b) 2 Bl. Com. 107; 1 Cruise, t. 1, h. 47; 1 Vin. Ab. 104, tit. Abeyance; Merlin, Répert. verbo Abeyance; Co. Litt. 342.



3. At common law an estate in fee simple will *descend to the heirs general of the person last seised of it*; it is for this reason that the word simple is added to the word fee, importing an absolute inheritance, clear of any condition, limitation, or restriction to particular heirs. And in all cases it is required in a deed that a grant should be to the grantee and his heirs forever, in order to create a fee simple to an individual; (a) but a grant to a corporation forever, without mentioning successor, will be good, because in contemplation of law a corporation never dies. (b) In wills, where the intention to devise a fee simple is clear, it is sufficient to create it. But in several states of the Union these inflexible rules have been either entirely abolished or greatly qualified, and an estate in fee may be created where it is manifestly the intention of the parties without the word heirs. (c)

4. Estates in fee simple are subject to curtesy and dower.

2. *Of a qualified or base fee.*

1699. A *qualified or base fee*, which is sometimes also called a *determinable fee*, is one which has a qualification subjoined to it, and which must be determined whenever the qualification annexed to it is at an end. A limitation to a man and *his heirs on the part of his father*, affords an example of this species of estate. (d) A further example may be found in the case of a grant to A and his heirs, *tenants of the manor of Dale*; in this case, as soon as the heirs of A cease to be tenants of the manor of Dale, the grant is entirely defeated. (e)

The proprietor of a qualified or base fee has the

(a) *Roberts v. Forsythe*, 3 Dev. 26.

(b) Co. Litt. 9 b.

(c) 4 Kent, Com. 8, 4th ed.

(d) Litt. § 254; Co. Litt. 27 a, 220; 1 Prest. on Est. 449; 2 Bl. Com. 109; Cruise, R. P. t. 1, § 82 et seq.

(e) 2 Bl. Com. 109.

same rights and privileges over his estate, till the qualification upon which it is limited is at end, as if he were a tenant in fee simple.

### 3. Of a conditional fee.

1700. A *conditional fee* is a limitation of an estate to some particular heirs of the grantee, exclusive of others; as, for example, the heirs of his body, or the male heirs of his body. This kind of limitation was originally unknown at common law. At an early period it came into very extensive use, and was much encouraged by the judges. It was construed to differ from a fee simple only in the following particulars, namely: 1, that its duration beyond the life of the donee depended upon his having issue; 2, that when this condition was fulfilled, it became liable to alienation, forfeiture and encumbrance, like an absolute estate.

It was the practice immediately on the birth of issue, when the condition was performed, to alienate the estate, and afterward buy it again free from any condition, by which the donor was defeated of his expectancy. (a) When, however, the donee died without having issue, or when his issue died without issue, and not having alienated, the donor might reënter for breach of condition.

1701. By the influence of the English nobility the statute of Westminster 2, 13 Edw. I., entitled "De donis conditionalibus," was passed. By this act the persons to whom the above named estates are con-

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(a) It is remarkable that precisely the same case and decision are to be found in the Roman law of fidei commissary donations. The rule of the civil law in these cases is, that *qui sunt in conditione positi, non concentur in testamento vocati*, and that rule is applied as well to acts *inter vivos*, as to testaments, upon the ground stated in the text, namely, that the condition had a suspensive effect, and that its performance by birth and issue rendered the estate of the donee absolute. Voet, Com. ad Pand. lib. 28, t. 2. De Liberis et Postliminis Instituendis, num. 9.

veyed are forbidden to bar their issue and the donor by alienation. It provides that if the donee die, leaving issue, they shall take the estate, but if he die leaving no issue, or upon any future failure of lineal heirs, of which the class is limited, it shall return back to the donor and his heirs.

In construing this statute the judges determined that where an estate was limited to a man and the heirs of his body, the donee should not in future have a conditional fee; but divided the estate by creating a particular estate in the donee, called an estate tail, subject to which the remainder in fee remained in the donor.<sup>(a)</sup> Where the donee had a fee simple before, by the statute he had only an estate tail; and where the donor had before but a bare possibility, by the construction of the statute, he had a reversion or fee simple expectant upon the estate tail.

#### 4. *Of fees tail.*<sup>(b)</sup>

1702. In the examination of estates tail, we will consider, 1, what is a fee tail; 2, the different kinds of fees tail; 3, how they are created; 4, the rights of the tenant in tail; 5, incidents to an estate tail; 6, how they are barred and destroyed; and, 7, the law of the United States as regards fees tail; 8, the resemblance of the *fidei commissa* of the Roman law to entails.

#### *Art. 1.—What is a fee tail.*

1703. An *estate tail* is described to be an estate of inheritance, created by the statute *de donis*, which is descendible to some particular heirs only of the person to whom it is granted, and not to his heirs in general.<sup>(c)</sup>

<sup>(a)</sup> 2 Inst. 335; Plowd. 248; 1 Burr. 115.

<sup>(b)</sup> See in general, as to estates tail, Bac. Ab. Estates in Tail; Com. Dig. h. t.; Vin. Ab. h. t.; Crabb on R. P. § 970 et seq.; Preston on Est. 355; Cruise, t. 2, c. 1, s. 12; 4 Kent, Com. 12 4th ed.

<sup>(c)</sup> Prest. on Est. 355; Cruise, t. 2, c. 1, s. 12.

The statute *restricts* an estate tail in three ways, namely : 1, that the intention of the donor expressed in the will or deed shall be observed ; 2, that the fee so given shall go to the issue, if there be any, and for want of such issue, shall revert to the donor, and by this means taking away the power of alienating, exercised by the donees of conditional fees, before the passage of the statute *de donis*, so as to bar their issue, and the reverter to the donor ; 3, by the common law, after the issue had, the land became descendible to all the heirs of the donee's body, whether they were of the donee's issue by the person named in the gift or by any other person ; and also liable to the curtesy or dower of the husband or wife ; but the statute provides that the issue of the second marriage shall not inherit. The second husband is not entitled to curtesy nor the second wife to dower.(a)

*Art. 2.—Of the kinds of fees tail.*

1704. Estates tail, as qualified in their limitation and extent, are of several sorts. They have different denominations, according to the circumstances under which, or the persons to whom they are limited. They are usually divided into estates tail general and special.

An *estate tail general* is where lands are given to a man and the heirs of his body begotten generally, without defining to which of those heirs in particular, and it is so called because it extends to all the issue or descendants of a man generally, of whatever woman begotten, who are capable of inheriting the estate *per formam doni* ; (b) in the same manner, when lands are given to a woman and the heirs of her body, such a gift is called a general tail, for though she may take

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(a) *Willion v. Berkley*, Plowd. 247 ; *Paine's Case*, 8 Co. 35.

(b) Litt. ss. 13, 14.

divers husbands, yet her issue by all of them may inherit as issue in tail.(a)

An *estate tail special* is where the estate is limited to some particular heirs of the body of the donee, as, to "his heirs by Anna, his present wife," instead of being limited to all the heirs generally.

Estates tail may not only be limited to the descendants of a particular woman, but also to the particular descendants of such a woman; as, for example, to the heirs male, when the estate is called an *estate in tail male*, and in such case females cannot inherit; or it may be given to a person and his heirs female, when the estate is called an *estate in tail female*, to which males cannot inherit.

In cases of special tails, to entitle a descendant to claim, he must have his title through that particular description of heirs to which the succession of the land was first limited.(b)

*Art. 3.—By what words an estate tail may be created.*

1705. As in the case of a fee simple, there is a distinction between the requisites in deeds and in wills. The words which may be sufficient in a will are insufficient in many cases in a deed.

1. *In deeds.*

1706. Regularly an estate tail ought to be limited to a man and the *heirs of his body*, for if it be limited to his issue, only a life estate is conveyed to him. The word *heirs* is indispensable.(c) But the word *heir* in the singular number, may, in a special case, create an estate, if such appears to have been the intention of the donor, for the word *heir* is *nomen collectivum*.(d)

(a) Litt. ss. 14, 15.

(b) Litt. s. 24.

(c) Co. Litt. 20.

(d) 1 Roll. Ab. 233; Amb. 453; Godb. 155; T Jones, 111; 2 Prest. on Est. 9, 10; 1 Ventr. 228; 10 Vin. Ab. 233, pl. 1.

The words of *the body*, are the proper words to be used, but they are not strictly required, and may be expressed by other words amounting to the same thing; as, "to a man and his heirs which he shall beget of his wife;" "to a man *et hæridibus de carne sua*;" to a man *et hæridibus de se*," are sufficient.(a) And the words "begotten," or "to be begotten," will make a good estate tail.

2. *In wills.*

1707. An estate tail may be created by words in a devise, which would be insufficient in a grant. A devise to a man and his issue will make an estate tail, though he has no issue alive; for words in a will which indicate the testator's intention to restrain the descent of the estate given to the lineal descendants of the devisee, give an estate tail, for the law supplies the words of *his body*, and makes it an estate tail.(b) A devise to a man and his children, he having no children at the time, will make an estate tail.(c) And, indeed, in a will an estate tail may arise by mere implication.(d)

*Art. 4.—Of the rights of the tenant in tail.*

1708. The tenant in tail, being master of the inheritance, *has power over all the lasting improvements growing on it*, so that he may cut down timber trees and dispose of them as he pleases, without barring the entail; but they must be removed by the buyer before the tenant's estate is determined.

In general, the tenant in tail is dispunishable for

(a) Co. Litt. 20 b.

(b) Bro. tit. Devise, 1; Co. Litt. 9, 25, 27; Gilb. on Dev. 32.

(c) See *Nightingale v. Burrell*, 15 Pick. 104.

(d) *Webb v. Hearing*, Cro. Jac. 415.

waste; he may, therefore, pull down houses, open mines, and do all other acts of ownership like a tenant in fee simple.<sup>(a)</sup>

By virtue of the statute 32 H. VIII., c. 2, the tenant in tail may make a lease, by writing indented under seal, for years or life, and it shall be good against the lessor and his heirs as if he had been seised in fee simple, but a lease within the statute must be by indenture; and in point of duration it cannot exceed three lives or twenty-one years.

*Art. 5.—Of the incidents of an estate tail.*

1709. These incidents are various :

1. One of the principal incidents of an estate tail is to vest in the tenant in tail the right to use the inheritance as if he had a fee simple.

2. The estate in tail is subject to the curtesy of the husband and the dower of the wife.

3. An estate tail cannot be merged, surrendered, or extinguished by the accession of the fee simple to the tenant in tail; so that he may have in his own right, at the same time, both an estate tail and the immediate reversion in fee, in the same lands.<sup>(b)</sup>

4. That the estate tail may be barred or destroyed by a fine or common recovery.

*Art. 6.—How fees tail may be barred or destroyed.*

1710. The inconveniences arising from these fettered inheritances were felt in England, and their injurious effects on the national industry and commerce were observable. But the landed aristocracy always opposed any amelioration of this destructive

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<sup>(a)</sup> Plowd. 259 ; 3 Leon. 121.

<sup>(b)</sup> Plowd. 296.

policy. What the parliament refused to do was accomplished by a bold, and before, unexampled stretch of the power of judicial legislation. In the twelfth year of the reign of Edw. IV., the judges, upon consultation, resolved, that an estate tail might be cut off or barred by a common recovery, and that by reason of the intended recompense, the common recovery was not within the restraint of the statute *de donis*.

These recoveries are now considered simply in the light of a conveyance on record, invented to give the tenant in tail an absolute power to dispose of his estate, as if he were a tenant in fee simple. These estates tail being by degrees thus unfettered, are now reduced to the same estate as conditional fees were at common law, even before the birth of issue.(a)

*Art. 7.—How estates tail are considered in the United States.*

1711. With other parts of English law, estates tail were introduced into this country, and they subsisted as in England, before our Revolution, with the right of barring them by fines and common recoveries as in that country. But being opposed to the spirit of our institutions, they were soon modified in many of the states, and in others they were wholly abolished by statutes which either converted them into fees simple, or gave an easy mode of barring them. In some they never existed.

The technical conditional fees at common law, as known and defined prior to the statute *de donis*, are no more favored than estates tail.

*Art. 8.—Of the resemblance of the fidei commissa of the Roman law with entails.*

1712. A resemblance has been imagined between

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(a) 2 Bl. Com. 120.



the *fidei commissa* of the civil law and entails, though some writers have declared that the Roman law was a stranger to the system of entails.

Every *fidei commissum* is a species of substitution, though it differs from a substitution strictly so called, inasmuch as it is an obligation or trust imposed on a person, binding him to give, or to do, something for another.

When a testator was desirous of disposing of his estate, so that it should descend in the family of the donee, without power of alienation, he gave it to one who was called the *institute*, requesting him to give it to some other person mentioned by the testator, who was called the *substitute*. Thus one person was substituted for another by *fidei commissum*, so that the second should receive the property after its having been enjoyed, even during life, by the other.

In the same manner that one person may be requested to transmit the property to another, the second may be made a trustee for a third, and again the third for a fourth, and so on to any number of substitutes. And, as alienation by any of the *fidei commissaries* is a breach of trust, this species of disposal of property produces something resembling what an estate was by the English law, before any means were invented to break entails. But this analogy did not exist until a legal remedy was provided to enforce the obligation of the fiduciary or trustee.(a)

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(a) Mr. Chancellor Kent, in his learned Commentaries, seems to be of opinion that these substitutions could not extend beyond the fourth generation, and that they were so limited by the 159th Novel of Justinian, ch. 2. But, as is well observed by Bowyer in his Commentaries on the Modern Civil Law, p. 152, "that celebrated law was framed to provide for the case of a private family, so that it cannot be interpreted as a general law." See what is said in Co. Litt. 191 a, note 1. Pothier, who is so remarkable for his great accuracy, is of the same opinion. He says, "Le droit Romain donnait une faculté indéterminée de faire autant de degrés de substitutions fidéi commissaires que bon lui semblait, et la substitution avait son effet dans tous ces degrés." *Traité des Substitutions*, sec. 7, art. 4. Chan-

## SECTION 2.—OF LEGAL ESTATES OF FREEHOLD, NOT OF INHERITANCE, OR ESTATES FOR LIFE.(a)

1713. Having treated of the estates of freehold of inheritance, namely, estates in fee simple, base or qualified fees, conditional fees, and fees tail, we will next consider the legal estates of freehold not of inheritance, or estates for life.

Estates for life are of five kinds; the first is created by the acts of the parties, the others by operation of law: they are, 1, those which are created by deed or other lawful assurance, and which are properly conventional; 2, curtesy; 3, dower; 4, jointure; 5, estate tail after possibility of issue extinct, which are legal life estates.

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cellor Kent, (Com. 21, note) says, in reference to what has just been quoted, "Pothier, very loosely, and without any reference to authority, says that the Roman law allowed entails to an indefinite extent." Pothier, however, is supported fully by Merlin in his *Répert. de Jurisp. verbo Substitution fidei commissaire*, sec. 10, § 4, art. 2; by Peregrenus, *de fidei commis*, art. 30, n. 17; and by Mantica, *de conjecturis ultimarum, voluntatem*, lib. 8, tit. 13, n. 57. These substitutions have been adopted in many of the codes of continental Europe, and found inconvenient, as fettering estates unnecessarily. They have been subjected to restraints in some countries, and in others they have been totally abolished. Bowyer, *Mod. Civ. Law*, 154; *Code Civil*, art. 896. The *Civil Code of Louisiana*, copying this article of the *Code Civil*, art. 1507, declares that "substitutions and *fidei commissa* are and remain prohibited."

The Mussulman code has adopted this system of substitution under the name of *hobouss*. The *hobouss* does not establish any inequality among the members of the family; it respects scrupulously the legitimate rights of all the heirs, according to the legal order of succession; but the property cannot be alienated till the extinction of the race: it is a true infeudation. The *hobouss* is established by a written instrument, the constituent reserving the *dominium utile* for himself and his descendants until the extinction of the race, and the direct domain is given to the mosque. By this means, the estate is completely, entailed in the giver's family. *Droit Civil Mussulman*, 273, 274.

(a) See in general, as to Estates for life, 3 Saund. 338; h. note; 1 Hov. Suppl. to Ves. Jr. 371 to 381; Bac. Ab. Estates for life; Com. Dig. Estates.

## § 1.—Of estates for life.

*Art. 1.—Of the nature of a conventional estate for life.*

1714. An estate for life is a freehold interest in lands, the duration of which is confined to the life or lives of some particular person or persons, or to the happening or not happening of some uncertain event.

The life estate may be either for the man's own life, or for the life of another person; in the first case it is called simply *an estate for life*, in the latter, *an estate pur autre vie*. There may be a third kind, where the term is for a man's own life and also another man's life; as if a lease were made during a man's own life and also during the lives of B and C. In this case the estate is not exhausted until the death of the last survivor.(a)

There are some estates for life which may depend upon future contingencies, before the death of the person to whom they are granted; for example, an estate given to a woman *dum sola fuerit*, or *durante viduitate*, or to a man and woman during coverture, or as long as the grantee shall dwell in a particular house.

A lease for five hundred years, although longer than any life can possibly last, is not a life estate, but an estate for years.(b)

*Art. 2.—How an estate for life is created.*

1715. An estate for life may be created by *express words*, as if Primus conveys land to Secundus for the term of his natural life. This is the simplest mode. Or they may be devised by the owner's last will.

They may also arise by *construction of law*, as, when Primus conveys land to Secundus, without

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(a) Dale's Case, Cro. El. 182.

(b) Co. Litt. 42.

specifying the term or duration, and without words of limitation. In this last case Secundus cannot have an estate in fee, according to the English law, and according to the law of those parts of the United States which have adopted and not altered the common law in this particular, but will take the largest which can possibly arise from the grant, and that is a life estate.(a)

*Art. 3.—In what things there may be an estate for life.*

1716. Not only lands and tenements, and all corporeal hereditaments, are the subjects of an estate for life, but also all incorporeal hereditaments.(b) A man may therefore have a life estate in a rent charge.

*Art. 4.—Of the rights and obligations of a tenant for life.*

1. *Of his rights.*

1717. A tenant for life has various rights, the principal of which are the following:

1. A tenant for life has a right to the full use and enjoyment of the land, with all its profits, during the continuance of his estate.

2. He may alienate the whole of his interest, or create any less estate out of it, unless restrained by some condition.(c)

3. In England the tenant for life has not in general the right to cut down timber trees, unless he is entitled to hold without impeachment of waste. But a distinction has been made between the situation of this country and that of England. It is frequently for the benefit of the reversioner or remainder man that the

(a) Co. Litt. 42 a. See *Gray v. Packer*, 4 W. & S. 17.

(b) Co. Litt. 42, a.

(c) *Wittingham's Case*, 8 Co. 44; Co. Litt. 42; *Jackson v. Van Hoesen*, 4 Cowen, 325.

land should be cleared, and, in these cases, the tenant for life would be authorized to cut down timber.(a)

4. In general the tenant for life cannot commit any wilful waste to the buildings, and pulling them down is considered waste.(b)

5. In ordinary cases a tenant for life cannot open a mine,(c) but the law appears to be otherwise with a tenant for life *sans waste*.(d) No permanent injury to the remainder man will be allowed, and for that reason a tenant for life will not be permitted to dig up the soil and make bricks for sale, nor use wood for that purpose.(e)

## 2. Of his obligations.

1718. The tenant for life is bound to keep down the interest of all incumbrances affecting the inheritance. And he is bound to apply the rents and income, not only to pay the interest which accrued and became due during the time he had possession, but also of all interest which was due and unpaid before the commencement of his life estate.(f) He is also bound to pay the taxes.(g)

## Art. 5.—Of the incidents to an estate for life.

1719. The incidents to an estate for life, whether conventional or legal, are the following:

1st. A tenant for life, unless restrained by agreement, has a right to *take* upon the land demised

(a) *Givens v. McCalmont*, 4 Watts, 463; *Hastings v. Crunkelton*, 3 Yeates, 261; *Jackson v. Brownson*, 7 John. 238; *Den v. Kinney*, 2 South. 552; *Parkins v. Cox*, 2 Hayw. 339.

(b) *Cruise*, t. 3, c. 2, s. 13; *Co. Litt.* 53 a.

(c) *Coates v. Cheever*, 1 Cowen, 460; *Cranch v. Puryear*, 1 Rand. 258.

(d) *London (Bp.) v. Webb*, 1 P. Wms. 528.

(e) *Livingston v. Reynolds*, 2 Hill, 157.

(f) *Tracy v. Hereford*, 2 Bro. R. 128; *Penryn v. Hughes*, 5 Ves. 99; *Dorrance v. Scott*, 3 Whart. 313.

(g) *Varney v. Stephens*, 9 Shepl. 331; *McMillan v. Robbins*, 5 Ham. 28.

*reasonable estovers* or *botes*.(a) But he has no right to cut down timber trees to the permanent injury of the inheritance, as has been already observed.

The right of the tenant for life to estovers, is distinct from the *right of common of estovers*, which is appendant or appurtenant to a house.

2d. When the determination of the estate is contingent or uncertain, the tenant for life, or his representatives, are not prejudiced by such sudden determination of the rights of the tenant for life. In such case he is entitled to reap the harvest where he has sown the land; and is entitled to what the law calls *emblems*.(b) And in case the tenant holds *pur autre vie*, and the person on whose life the estate depends, who is called the *cestui que vie*, happens to die, the tenant shall have the crop or emblems, which he has sown. It makes no difference in this respect, whether the estate be determined by the act of God, or by act of law; an example of the latter case is found where a lease is made to husband and wife during coverture, and afterward they are divorced, the husband shall have the emblems.(c) But where the estate is determined by the acts of the tenant for life, he is not entitled to the emblems.(d)

3d. On the termination of the life estate, his under tenants have the same rights he would have had if the estate had remained in him, and even greater, for if the tenant for life should terminate the estate by his own act, that will not injuriously affect the under tenant, who will be entitled to the emblems, as if it had been terminated by act of God, or by act of law. For example, if a woman hold land *durante*

(a) See ante B, part 2, c. 4. See *Loomis v. Wilbur*, 5 Mason, 13; *Elliot v. Smith*, 2 N. H. Rep. 430.

(b) Emblems have been considered ante, B. 2, part 1, t. 2, c. 1, s. 2, n. 1582.

(c) *Oland's Case*, 5 Co. R. 116.

(d) *Co. Litt.* 55.

*viduitate*, and lease it, and then marries, the under tenant would be entitled to the emblements, although she could not have claimed them; (a) the reason is, that the under tenant shall not be affected by the acts of the widow, which he could not prevent.

§ 2.—Of curtesy.

1720. Having treated of conventional estates for life, we will now consider legal estates which arise by operation of law; these are curtesy, dower, jointure, and an estate in tail after possibility of issue extinct.

*Art. 1.—What is an estate by the curtesy.*

1721. Littleton calls this estate, an estate by the curtesy of England, because, according to him, it is peculiar to that country. (b) This is evidently an error, for it is found, with some modification, it is true, in the ancient and modern laws of Scotland, (c) in the old laws of Ireland, Normandy, and Germany. In France there were several customs before the enactment of the Code Civil, which gave a somewhat similar estate to the surviving husband out of the wife's inheritances. (d)

An *estate by the curtesy*, is an estate for life, created by act of law, which is described as follows: When a man marries a woman seised at any time during the coverture of an estate of inheritance, in severalty, in coparcenary, or in common, and has issue by her born alive, and which might by possibility inherit the same estate as heir to the wife, and the wife dies in the lifetime of the husband, he holds the land during his life by curtesy, and it is immaterial whether the issue be living at the time of the seisin, or at the death of

(a) Cro. Eliz. 461.

(b) Litt. s. 35.

(c) Ersk. Inst. B. 2, t. 9, n. 52.

(d) Merlin, Répertoire, verbo *Linotte et Quarte de Conjoint Pauvre*.

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Book 2, part 3, tit. 2, div. 1, chap. 1, sec. 2, § 2; art. 2.

No. 1724.

the wife, or whether it was born before or after the seisin.(a)

*Art. 2.—Of the requisites to create an estate by the curtesy.*

1722. From the definition already given, it is evident that there must be, 1, a marriage; 2, seisin of the wife; 3, birth of issue; 4, death of the wife.

1. *Of the marriage.*

1723. The marriage must be a lawful marriage; for a void marriage does not entitle the wife to the curtesy; as if a married man were to marry a second wife, during the existence of his first marriage, he would not be entitled to curtesy in such second wife's estate. But if the marriage had been merely voidable, he would be entitled, because no marriage merely voidable, can be annulled after the death of the parties.(b)

2. *Of the seisin of the wife.*

1724. According to the English law, the seisin of the wife must be a seisin in deed,(c) but this strict rule has been somewhat qualified by the circumstances of this country; where a woman is the owner of wild uncultivated land, not held adversely, she is considered as seised in fact, and the husband is entitled to his curtesy.(d) And where land is in lease for years, the perception of the esplees will be evidence of seisin,(e) so as to entitle the husband to the curtesy; and even without receipt of rent, the possession of the lessee being deemed the possession of the husband and wife.(f)

(a) 1 Litt. s. 35; Co. Litt. 29 b.; 8 Co. 34.

(b) Cruise, t. 5, c. 1, s. 6.

(c) Adams v. Logan, 6 Monr. 179; Bush v. Bradley, 4 Day, 298; 1 Pet. 507; Mercer v. Seldin, 1 How. U. S. R. 37; S. C. 17 Pet. 61.

(d) Davies v. Mason, 1 Pet. 506; Jackson v. Sellick, 8 John. 262; Lowry v. Steel, 4 Ham. 170; Barr v. Galloway, 1 McLean, 476; McCorry v. King, 3 Humph. 267.

(e) 1 McLean, 476.

(f) Lowry v. Steel, 4 Ham. 170; Green v. Liter, 8 Cranch, 245.



The wife's seisin must have been such as would entitle her to inherit. But in point of time it is not requisite that it should be before the birth of issue; it may be either before or after.(a)

But statutes have been enacted in several of the states which have wholly or partially changed the law in relation to the requisition of a seisin in deed.(b)

### 3. Of the issue of the wife.

1725. To entitle the husband to curtesy, the issue must possess the following qualifications: 1, be born alive; 2, in the lifetime of the mother; 3, be capable of inheriting the estate.

1726.—1. The issue must be *born alive*. In Pennsylvania, by act of assembly of April 8, 1833, the husband's right as tenant by the curtesy shall take place, although there be no issue of the marriage, in all cases where the issue, if any, would have inherited; because, if dead born, it is the same as if it had never existed. It being a maxim of law that *mortuus exitus non est exitus*,(c) and with this agrees the Roman law.(d) Whether a child is born alive, is to be ascertained from certain signs which are always attendant upon life. The fact of the child's crying is the most certain. There may be a certain motion in a new born infant, which may last even for hours, and yet there may not be complete life. It seems, that in order to commence life, the child must be born with ability to breathe, and must actually have breathed.(e)

(a) *Johnson v. Johnson*, 5 Cowen, 74.

(b) *Bush v. Bradley*, 4 Day. 298; *Stoolfoos v. Jenkins*, 8 S. & R. 175; *Chew v. Southwark*, 5 Rawle, 161; 8 John. 262; 1 Pet. 506.

(c) Co. Litt. 29 b; and see 2 Paige, 35.

(d) Dig. 50, 16, 129; Domat, liv. prélim. t. 2, s. 1, n. 4 and 6; 1 Chit. Pr. 35, note (z).

(e) Briand, Méd. Lég. prém. partie, c. 6, art. 1. To constitute a birth, so as to make the killing of a child murder, the whole body must be detached from that of the mother; 5 Carr. & Payne, 329; 6 Carr. & Payne, 349; but if it be killed after it has come wholly forth from the body of the mother, but is still connected with the umbilical cord, such killing will be murder, 9 Carr. & Payne, 25.

1727.—2. The issue must be born *during the life of the mother*, for if the mother dies in labor, and the Cæsarian operation is performed, after her death, the husband is not tenant by the curtesy; because at the instant of the mother's death he clearly was not entitled, for then he had no issue born, and the land descended to the child in the mother's womb, it being a rule that a child *in ventre sa mere* can inherit, if he be afterward born alive, though if he be born dead, he cannot transmit any right to others, and the estate being so vested, it shall not afterward be taken from the child.(a) But the time when the issue is born is immaterial, provided it be during the coverture.

1728.—3. The issue must not only be born during the life of the mother, but it must be *capable of inheriting* the mother's estate, in order to entitle the husband to the curtesy. If, therefore, a woman be a tenant in tail *male*, and has only a *daughter* born, the husband is not tenant by the curtesy, because the child could not inherit the estate in tail male.(b)

1729. By the birth of the child, the husband becomes tenant by the curtesy *initiate*, but his estate is not *consummate* until the death of the wife.

#### 4. *Of the death of the wife.*

1730. To make the estate by curtesy complete, the death of the wife is requisite.

*Art. 3.—Of what estate and things there may be a tenant by the curtesy.*

1731. Curtesy was formerly confined to such lands as were given in frank marriage,(c) but was soon after extended to *all the inheritances of the wife*. Curtesy may be had of an estate of inheritance in fee, or in an

(a) Co. Litt. 29; 2 Bl. Com. 128.

(b) Co. Litt. 29 a.

(c) As to what is frank marriage, see 2 Bl. Com. 115.

estate held in trust for the wife, (a) but the husband is not entitled to curtesy to lands devised to a trustee for the separate use of the wife in fee simple. (b)

But when the wife's estate is in *reversion* or *remainder*, the husband is not, in general, entitled to the curtesy, unless the particular estate is ended during the coverture. (c)

Regularly a man may be tenant by the curtesy of lands, tenements and hereditaments of freehold, and also of some incorporeal hereditaments, as a rent.

In equity the husband may be tenant by the curtesy of money agreed or directed to be laid out in land, though not actually laid out. (d)

*Art. 4.—How the estate of curtesy may be lost.*

1732. This may occur in various ways :

1st. When the wife's estate, which she had during coverture, is defeated by a paramount title.

2d. By a divorce *à vinculo*, (e) but a divorce *à mensa* will not have that effect. (f)

3d. Unlike the case of the wife, who loses her dower by adultery, the husband does not lose his curtesy on that account. (g)

*Art. 5.—Of the law in the United States in relation to curtesy.*

1733. The estate by curtesy is generally prevalent

(a) *Watts v. Ball*, 1 P. Wms. 108; *Shoemaker v. Walker*, 2 S. & R. 556; *Robinson v. Codman*, 1 Sumn. 128.

(b) *Cockran v. O'Hern*, 4 Watts & S. 95; *Roberts v. Dixwell*, 1 Atk. 607. But see *Hearle v. Greenbank*, 3 Atk. 696; S. C. 1 Ves. 298; *Morgan v. Morgan*, 5 Madd. 408.

(c) *Perk. ss.* 457, 464; *Co. Litt.* 29 a; *Stoddard v. Gibbs*, 1 Sumn. 263.

(d) *Sweetapple v. Bindon*, 2 Vern. 536; *Dodson v. Hay*, 4 Bro. C. C. 404; *Cunningham v. Moody*, 1 Ves. 174. See *Green v. Green*, 1 Ham. 244; 13 Pick. 154.

(e) *Wheeler v. Hotchkiss*, 10 Conn. 225; *Matlocks v. Stearns*, 9 Verm. 326.

(f) *Smoot v. Levat*, 1 Stew. 590.

(g) *Sidney v. Sidney*, 1 P. Wms. 269.

in the United States; in some of them it has received modifications. In Vermont, the title by curtesy has been laid under the equitable restriction, of existing only on the event of the children of the wife entitled to inherit, dying within age, and without children. In South Carolina, the tenancy by curtesy, *eo nomine*, has ceased by the provisions of an act passed in 1791, relative to the distribution of intestates' estates, which gives to the husband surviving his wife, the same share of her real estate as she would have taken out of his, if left a widow, and that is one-third or one half in fee, according to circumstances. In Louisiana, where the common law has not been adopted in this respect, this estate is unknown. And in Georgia, curtesy does not exist, because the husband is entitled to the real estate of his wife in the same way that he is to the personal.

§ 3.—Of dower.(a)

1734. The second kind of estate for life which arises by operation of law, is the estate in dower.

*Art. 1.—Definition and kinds of dower.*

1735. *Dower*, at common law, is the right of a woman in a third part of all the lands and tenements, in fee simple, fee tail general, or as heir in special tail, of which her deceased husband was seised, either in deed or in law, at any time during the coverture, and of which any issue she might have had, might by possibility have been heir, to hold to herself during her natural life.(b)

1736. Besides this kind of dower, which is the only

(a) See generally, as to dower, Bac. Ab. h. t.; Dane's Ab. h. t. : Com. Dig. h. t.; Perk. 300 et seq.; 1 Swift's Dig. 85; 1 Vern. Rep. by Raithby, 218, n, 358 n; Arch. Civ. Pl. 469; Vin. Ab. h. t.

(b) Litt. s. 36; 7 Greenl. 383.

one prevalent in the United States, there are other species in England, namely :

1st. Dower *ad ostium ecclesiæ*, which takes place when a man comes to the church door to be married ; and after troth plighted, he endows his wife of a certain portion of his lands.

2d. Dower *ex assensu patris*; this is only a species of dower *ad ostium ecclesiæ*, by which the son, with the consent of the father, endowed his wife, at the church door, of a certain portion of his father's land.

3d. There was another kind, *de la plus belle*, to which the abolition of military tenure has put an end.

4th. In addition to these, there was a kind of dower by *partieular customs*.

1737. As by the common law the husband is entitled to all the wife's chattels in possession, and has a right to reduce into possession those which are in action, and is entitled besides to a curtesy in his wife's land when he survives her, it is but just that the wife should have dower in his lands for her support after his death.

*Art. 2.—Of the requisites of dower.*

1738. To create a title to dower, three things are indispensably requisite: 1, marriage; 2, seisin of the husband; 3, death of the husband.

*1. Of the marriage.*

1739. The right which a woman has to have dower in her husband's estate, being one of the civil effects of marriage, it follows, that to entitle her to have dower out of her husband's estate, the marriage must not only have been *lawfully contracted*, but it must have been such as to have *civil effects*.(a)

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(a) Smart v. Whaley, 6 Sm. & Marsh. 308.

When the marriage has been contracted in good faith, and it was merely voidable during the lives of the parties, it is such a marriage as will entitle the wife to dower, because it cannot be avoided by others after the death of one of the parties.(a) A wife *de facto*, whose marriage is voidable by decree, as well as a wife *de jure*, is entitled to it; and the wife shall be endowed, though the marriage be within the age of consent, and the husband dies within that age.(b)

2. *Of the seisin of the husband.*

1740. The husband must have been seised, some time *during the coverture*, of the estate of which the wife is dowable; and the estate of which he was so seised must have been such that any issue which the wife might have had, might by possibility have been heir. A seisin in law of the husband, will be as effectual as a seisin in deed to render the wife dowable, because the wife cannot control the husband to bring his title to an actual seisin.(c)

But to entitle the wife to dower, the seisin must vest the land in the husband *beneficially for his own use*,(d) though the length of time during which the husband was seised is immaterial. The seisin of the husband, for a *transitory instant only*, when the same act which gives him the estate, also conveys it out of him again, will not entitle the wife to dower.(e)

(a) Cruise, t. 5, c. 1, s. 6.

(b) Co. Litt. 33 a; Doct. & Stud. 22.

(c) Perk. 371, 372; Co. Litt. 31, a; Eldredge v. Forrestal, 7 Mass. 253.

(d) Stanwood v. Dunning, 2 Shep. 290; Randolph v. Doss, 3 How. Miss. 205; Griggs v. Smith, 7 Halst. 22; Stow v. Tift, 15 John. 458; Maybury v. Brien, 15 Pet. 21; Crafts v. Crafts, 2 McCord, 54; Holbrook v. Finney, 4 Mass. 566; Coates v. Cheever, 1 Cowen, 460.

(e) Co. Litt. 31; Nash v. Preston, Cro. Car. 190; Sneyd v. Sneyd, 1 Atk. 442; 2 Bl. Com. 132; Bullard v. Bowers, 10 N. H. Rep. 500; Stanwood v. Dunning, 2 Shep. 290; Emerson v. Harris, 6 Metc. 475.

*3. Death of the husband.*

1741. This must be a *natural* death, though there are some authorities which declare that a civil death shall have the same effect.

*Art. 3.—Who is entitled to dower.*

1742. All women who are citizens of the United States, and have attained the age of nine years, before the death of their respective husbands, are, by the common law, entitled to dower, of whatever age the husbands may be.(a)

At common law an alien could not be endowed, because no alien could hold lands;(b) but in several of the states of the Union this disability has been removed by statute, at least to a certain extent, and in such cases, doubtless the widow would be entitled to dower.(c) In New York, it has been held that where the wife of a citizen was an alien, and while she remained such, he sold and conveyed his estate, she was not entitled to dower, although she afterward became naturalized, before the death of her husband.(d)

*Art. 4.—Of what estate the wife is dowable.*

1743. When the husband owns the land in fee, and has been seised during the marriage, the wife is entitled, as a matter of course, this being the simplest kind of estate of inheritance. In this case, the freehold and the inheritance are consolidated, and are in the husband *simul et simul* during the marriage, and thus render the wife dowable. But if an estate, not

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(a) Co. Litt. 33 a.

(b) *Sutliff v. Forgey*, 1 Cowen, 89. See 5 Cowen, 713; *Sistare v. Sistare*, 2 Root, 468.

(c) 4 Kent, Com. 36, 37, 4th ed.

(d) *Priest v. Cummings*, 16 Wend. 617.

a freehold, be vested in a third person, and intervene between the freehold and the estate of inheritance of the husband, the wife is not dowable; as, for example, if lands be limited to Paul for life, remainder to Peter for life, remainder to Paul in fee, the wife of Paul is not entitled to dower, unless the estate to Peter determines during the coverture. The reason of this is that the estate of Peter is a freehold which prevents the merger and consolidation, which would otherwise take place in the life estate and the remainder of Paul. If Peter's estate had been an estate for years, it would not have prevented the consolidation and merger, and the widow would have been dowable.(a)

A woman is dowable of *all estates* of which her husband was *seised* in tail general or special, of which her issue could inherit. She is also entitled to dower to all estates held in coparcenary or in common, of which the husband was *seised*.(b) But when the husband holds in joint tenancy, the wife is not dowable, because the survivor is entitled to the whole; nor is she entitled where the husband conveys his interest in such joint tenancy to another.(c)

A widow is not dowable of an estate in remainder and reversion, expectant, on an estate of freehold,(d) because the husband could have no seisin. But she is entitled to dower of a reversion expectant on a term for years, because, in this case he is *seised* of the freehold.(e)

1744. In general it may be stated, that in the United States, contrary to the English rule, the widow is entitled to dower in lands mortgaged by her husband, subject of course, to the mortgage, and in one or more states she is entitled to dower against the

(a) Perk. ss. 333, 335, 338; *Bates v. Bates*, 1 Ld. Raym. 326.

(b) *Potter v. Wheeler*, 13 Mass. 504.

(c) *Maybury v. Brien*, 15 Pet. 21.

(d) *Otis v. Parshley*, 19 N. H. Rep. 403.

(e) *Cruise*, t. 6, c. 3, s. 10.



mortgagee, where she did not join in the mortgage. (a) The reason assigned for this rule is, that while the mortgagee does not exert his right of entry or foreclosure, the mortgagor is considered as being legally as well as equitably seised, in respect to all the world but the mortgagee and his assigns; the owner of the equity being looked upon as the proprietor of the land, and the mortgage is regarded as personal assets.

When a beneficiary trust is held for the husband, in several of the states of the Union the wife is entitled to dower in such trust estate; (b) while in others, and in England, she is not so entitled. (c)

1745. The widow is entitled to dower in *all hereditaments*, whether corporeal or incorporeal; she may be therefore, endowed of a rent, provided the husband was seised of an estate of inheritance in the same.

The right to dower extends to all *mines of coal or lead wrought during the coverture*, whether by the husband or by lessees for years, paying pecuniary rents, or rents in kind; but dower cannot be claimed of mines or strata unopened. (d)

1746. When there are *two widows* entitled to dower in the same land, as where Paul, the father of Peter, dies, leaving a widow, who is entitled to dower in his land, and the land descends to Peter subject to this dower; and then Peter marries, and dies, leaving a widow, and the land descends to his son Joseph; the widow of Paul shall have dower in the whole, and the widow of Peter is entitled to dower in two-thirds of the land. (e)

1747. In those cases where the husband has *aliened*

(a) *Campbell v. Knights*, 11 Shep. 332; *Collins v. Torry*, 7 John. 278; *Bolton v. Ballard*, 13 Mass. 227; *Barker v. Parker*, 17 Mass. 564; *Cass v. Martin*, 6 N. H. Rep. 25.

(b) 4 Kent, Com. 46.

(c) *Hamlin v. Hamlin*, 1 App. 141.

(d) *Stoughton v. Leigh*, 1 Taunt. 402; *Billings v. Taylor*, 10 Pick. 460; *Crouch v. Puryear*, 1 Rand. 258.

(e) See *Leawitt v. Lamprey*, 13 Pick. 382.

*the estate*, of which he was seised during coverture, the widow is entitled to dower only of the estate as it was at the time of alienation,<sup>(a)</sup> but in case the heir has made improvements before assignment of dower, the dowager is entitled to dower of the whole estate at the time of the assignment, for it was the heir's folly to make such improvements before dower was assigned.<sup>(b)</sup>

1748. In equity when lands are agreed to be turned into money, or money into land, they are considered as of that kind of property into which they were agreed to be *converted*; and the right to such property is regulated as to the widow's right as if the conversion had happened.<sup>(c)</sup>

*Art. 5.—Of assignment of dower.*

1749. By *assignment of dower* is meant the act by which the rights of a widow in her late husband's real estate are ascertained, and set apart for her benefit. We will consider, 1, when it ought to be made; 2, by whom; 3, how; 4, its effects.

1. *When dower ought to be assigned.*

1750. The right of the wife becomes consummate by the death of the husband, and at common law, she is immediately entitled to it, or within the period of forty days after, during which time the wife has a right, by Magna Charta, c. 7, to remain in her husband's late dwelling house, of which she is dowable, and to be supported *de bonis viri*.<sup>(d)</sup> This right of residence is called her *quarantine*.<sup>(e)</sup>

(a) *McClanahan v. Porter*, 10 Mis. 746; *Thompson v. Morrow*, 5 S. & R. 289; *Shirtz v. Shirtz*, 5 Watts, 255; *Humphrey v. Phinney*, 2 John. 484; *Wilson v. Oatman*, 2 Blackf. 223; *Ayer v. Spring*, 8 Mass. 80.

(b) *Catlin v. Ware*, 9 Mass. 218.

(c) *Green v. Green*, 1 Ohio, 538.

(d) Various laws regulating the widow's right to quarantine have been passed in the several states; in some she may occupy the mansion one year; in others till dower is assigned; and in some she is not only entitled to the mansion, but to the plantation.

(e) *Co. Litt.* 32, 34.

2. *By whom dower ought to be assigned.*

1751. The assignment ought to be made *by the heir*, or the person entitled to the freehold, for such assignment cannot be made by a person who has not a freehold in the estate, or against whom a writ of dower does not lie. But it is not requisite that the assignor should have a lawful estate of freehold; therefore a disseisor, abator, or intruder may assign, and the assignment cannot be avoided unless such person is in covin with the widow.(a)

3. *How dower ought to be assigned.*

1752. The assignment of dower at common law is of one-third part of the lands and tenements of which the widow is dowable, to be set out *by metes and bounds*, where the same is practicable, to be held by her for life. This is the assignment of dower to which the widow is entitled of common right. It may be made by the agreement of the parties, or by the sheriff when lawfully authorized by the writ of a competent court.

1° *Of assignment by the parties.*

1753. Dower may be assigned by deed, by writing not under seal, and by parol,(b) because the widow does not hold by virtue of the assignment, but by law, nothing being required but to ascertain her share, and when this is done, and she has entered, the freehold vests in her.

1754. To an assignment of dower, several things are requisite.

1st. It must be either of some *part of the land* of which she is dowable, or of a rent, or other profit, issuing out of the same; an assignment of other land,

(a) Plowd. 54; Perk. ss. 394 et seq.

(b) 9 Vin. Ab. 269; Conant v. Little, 1 Pick. 189; Jones v. Brewer, 1 Pick. 314; Moore v. Waller, 2 Rand. 421; Shattuck v. Gragg, 23 Pick. 88; Johnson v. Neil, 4 Ala. 166.

of which she is not dowable, or of a rent issuing out of the same, is no bar to an action for dower, unless the assignment be made by the consent of the widow, in which case she will be bound by her agreement.(a)

2d. It must be an *absolute* assignment, for a *conditional* assignment will not bar her of her dower.(b) It has been held that if lands be assigned to the widow as her dower with the exception of trees growing upon it, the exception is void.(c)

3d. Dower must be assigned of an absolute *estate for life*; an assignment to the widow of an estate for years, therefore, would not bar her claim for dower.

Dower may be assigned by the heir, if of full age, or by his guardian, if he be an infant,(d) or by the alienee of the husband.(e)

2° *Of assignment of dower by the sheriff.*

1755. The widow has a right to have the assignment made by *metes and bounds*, where it can be done, and sometimes it is the interest of third persons that it should be so made, and that each tract of land should be subject to its dower; as, for example, where the husband died seised of two farms, and he had been seised of another which he had sold during the coverture, it is the right of the widow to have her dower in each tract, and it is the interest of the heir and the alienee, that each should be subject to it, and that the widow should not take one of the farms as her dower for the whole three.(f)

1756. Where a house is subject to dower, the widow's right may be assigned by giving her *certain*

(a) Turney v. Sturges, Dy. 91, pl. 12.

(b) Co. Litt. 34 b.

(c) 1 Roll. Ab. 682.

(d) Jones v. Brewer, 1 Pick. 314.

(e) See Stewart v. Stewart, 3 J. J. Marsh, 48; Harshaw v. Davis, 1 Strobb. 74.

(f) Coulter v. Holland, 2 Harring, 330; Anon. Moor, 19,

rooms in it.(a) In a case where the sheriff assigned to the widow one-third of each room in the house, marking the bounds with chalk, he was considered as having discharged his duty vexatiously and maliciously, the assignment was therefore set aside, and the sheriff was imprisoned for his contempt.(b)

1757. From the nature of the property, in certain cases, dower cannot be assigned of any particular part by metes and bounds; for example, where the husband holds *in common with another*, the dower must be assigned to hold in common also.(c) Again, where the husband died seised of mines or minerals, lying in the lands of another person, an assignment by metes and bounds cannot be made; and if there are several, the sheriff should assign such number of them as will be equal to one-third of the whole.(d)

3° *Of the effect of the assignment.*

1758. When an assignment is made by the heir of full age, it will be binding on him, though it may exceed one-third of the value of the estate, but if made by the heir while under age, he is entitled to a writ of admeasurement of dower.(e)

By the assignment, the *freehold for life* in a third part of the estate is *vested* in the widow. As soon as dower is assigned she holds by virtue of law, and is in as of the estate of her husband; so that after assignment, she is considered as holding by relation immediately from the death of her husband; and, therefore, the heir is not considered as having ever been seised of that part of his ancestor's estate of which the widow is endowed.(f)

(a) *White v. Story*, 2 Hill, 543.

(b) *Howard v. Cavendish*, Cro. Jac. 621; S. O. Palm. 264.

(c) 1 Brownl. 127; F. N. B. 149, J.

(d) *Stoughton v. Leigh*, 1 Taunt. 402.

(e) *Stoughton v. Leigh*, 1 Taunt. 401.

(f) Litt. sec. 393.

4. *Of the rights and obligations of the dowress.*

1759. Before assignment, a woman has no estate in the land of her deceased husband, (a) and she cannot therefore mortgage it. (b) After assignment and entry the freehold in the part assigned is vested in her, it being considered as a continuance of the husband's seisin. (c)

1760. In the assignment of dower, there is an *implied warranty of title*, and if the tenant in dower be impleaded, she may vouch the heir, and if evicted, by paramount title, from the lands assigned, she shall be endowed anew; unless in the cases where she has been endowed *against common right*, with her own consent. (d)

1761. A tenant in dower is for many purposes in the same situation as a tenant for life, and is subject to the same liabilities. Standing in the place of her husband in respect to the land assigned her in dower, she is subject to one-third of the duties and services to which his estate was liable. (e)

Such a tenant cannot commit waste, and is answerable to the heir if she commit or permit any such waste to the estate.

5. *How dower may be defeated or barred.*

1762. A right of dower may be prevented from attaching, and then it is totally defeated; or it may be barred by a variety of causes after it was detached. These will be separately examined.

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(a) *Pringle v. Gaw*, 5 S. & R. 536; *Brown v. Adams*, 2 Whart. 191; *Evans v. Webb*, 1 Yeates, 425; *Shotman v. Ledam*, 3 Ohio, 13; *Moore v. Gilliam*, 5 Munf. 346; *Sheaff v. O'Neill*, 9 Mass. 14; *Cox v. Jagger*, 2 Cowen, 639.

(b) *Strong v. Bragg*, 7 Blackf. 62.

(c) *Windham v. Portland*, 4 Mass. 388.

(d) *Scott v. Hancock*, 13 Mass. 168; *Jones v. Breever*, 1 Pick. 317; *Perk. s.* 480.

(e) *Crabb on R. Prop. ss.* 1161, 1162.

1° *How dower may be prevented or defeated.*

1763. When a third party recovers the land from the husband by a just *prior title*, it is clear the wife can have no dower in it; because the wife can be entitled to dower only in the land of which her husband was of right seised of an estate of inheritance.(a)

The widow's right to dower will be defeated upon the *restoration of the seisin* under the prior title, in the case of a defeasible estate, as in case of a reëntry for a condition broken, which abolishes the intermediate seisin.

The right will not be defeated either *because there are no heirs*, as in the case where the husband had a fee, and the land escheated, or where there are no heirs qualified to take the inheritance; as where a tenant in tail dies without heirs by which the inheritance reverts to the donor; in these and such cases, the widow shall not be defeated of her dower.(b)

The title of the wife to dower may be defeated in general by a mortgage or other incumbrance subsisting before the right to dower attaches, and which would destroy the husband's seisin. And, it is said, it will be destroyed by the foreclosure of a mortgage given by the husband *eo instanti* with receiving the conveyance, and which was a part of the agreement.(c)

2° *How dower may be barred.*

1764. After dower has attached by the seisin of the husband, it may be defeated in a variety of ways:

1st. The most common way of barring dower in the United States, is by a conveyance of the estate to a

(a) Litt. sec. 393; Co. Litt. 240 b; Perk. ss. 311, 312, 317.

(b) Bro. tit. Tenures, pl. 33; Bro. tit. Dower, pl. 36.

(c) In Pennsylvania, a judicial sale for the payment of debts, or under a mortgage given by the husband alone, *bona fide*, will defeat the widow's right of dower. *Reed v. Morrison*, 12 S. & R. 21; *Keller v. Michael*, 1 Yeates, 300.

purchaser, in which the husband and wife join. This is done by a usual deed, acknowledged according to the form required in the state or territory where the land is located.(a) But a conveyance by the husband alone will not affect her rights, the alienee taking subject to them.

2d. By the statute Westm. 2, 13 Edw. I., the principles of which have been reenacted or adopted in the United States generally, with modifications, *adultery* in the wife, accompanied with elopement, were punished by a loss of dower.

3d. Dower is barred by a *divorce à vinculo*, but not by a *divorce à mensa et thoro*.(b)

4th. It is barred by the widow's *acceptance of an interest in the dowable estate*, which is inconsistent with her right to dower; this being considered a satisfaction.

5th. The wife is barred when she *takes a devise or legacy* under the will of her husband *instead of dower*.(c) But a widow who makes an election to take under her husband's will, under a mistaken supposition that the estate which she accepts in lieu of dower is unincumbered, and it is afterward made liable for her husband's debts, will be relieved in equity.(d)

6th. She is barred when she accepts of a *jointure*, the nature of which will be explained hereafter.

7th. Her dower will of course be defeated by her *release* after her husband's death, but a release made to him during the coverture is not valid;(e) and release to him before marriage is void.(f)

(a) See Bouv. L. D. Acknowledgment.

(b) 2 Bl. Com. 130. In some of the states by statutory directions the courts are required to make a reasonable provision out of the husband's estate for the wife, when a divorce is granted, and she is not in fault.

(c) Cauffman v. Cauffman, 17 S. & R. 16; Duncan v. Duncan, 2 Yeates, 305; Adsit v. Adsit, 2 Johns. Ch. 452; Reed v. Dickerman, 12 Pick. 151.

(d) Kidney v. Coussmaker, 12 Ves. 143.

(e) Rowe v. Hamilton, 3 Greenl. 63.

(f) Hastings v. Dickinson, 7 Mass. 155.



## § 4.—Of jointure.(a)

1765. The next estate for life is the estate of jointure. In England jointures are regulated by the stat. 27 Hen. VIII., c. 10, commonly called the statute of uses.

*Art. 1.—Requisites of a jointure and their different kinds.*

1766. A *jointure* is a competent livelihood of freehold for the wife, of lands and tenements, to take effect in profit or possession, presently after the death of the husband, for the life of the wife at least.(b)

1767. To make a good jointure, it must be attended with the following circumstances, namely:

1st. It must take effect, in possession or profit, immediately *from the death* of the husband.

2d. It must be for the *wife's life*, or for some *greater estate*, and not for an estate *pur autre vie*, for a term of years, or any less estate.

3d. It must be limited to the wife *herself*, and not to any other in trust for her.

4th. It must be in *satisfaction* of the wife's dower, and not of a part only.

5th. The estate limited to the wife must be expressed or averred to be, in satisfaction of her *whole dower*.

6th. It must be made *before marriage*.(c)

1768. The estate which has just been described is a jointure at law. In equity any provision which a woman accepts before marriage in satisfaction of dower; as, for instance, a trust estate, or a mere personal covenant of the husband, may constitute a good jointure.

(a) See Bac. Ab. h. t.; 2 Bl. Com. 137; Cruise, t. 7; Perk. h. t.; Com. Dig. h. t.

(b) Co. Litt. 36.

(c) Bac. Ab. Dower and Jointure G.

A jointure in equity does not require all the particularities of a jointure at law. It will be good if the following circumstances concur :

1st. If it be made *before* marriage.

2d. If the thing accepted be taken *in lieu of dower*, but it is not requisite that it should be an estate of freehold to continue during the life of the wife at least.

3d. Though to be binding at law, a jointure must be expressed in the deed to be in satisfaction of dower, if such was the *intent* it will be binding in equity.

*Art. 2.—Of the rights and obligations of a jointress.*

1769. The interest which, at law, the jointress has in her jointure cannot be for less than *for life*, although it may be for more. Her estate is somewhat like that of a dowress, but there is some difference between them.

Like a tenant in dower, the jointress is entitled to *emblements*, but she is not entitled to the emblements upon the lands at her husband's death, for the jointure is not, like dower, a continuance of the husband's estate.(a)

A jointress may grant leases for years or for her own life.

In case of eviction from her jointure she is immediately *restored* to her right to dower, either entirely or in proportion to the value of the lands evicted; whether such eviction take place before or after her husband's death, and notwithstanding an acceptance by the widow of the remaining portions of the lands.

A jointress will be restrained from committing waste.

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(a) 9 Vin. Ab. 373, pl. 82.

*Art. 3.—Of the effect of a jointure.*

1770. When a legal jointure has been made before marriage, it is a complete *bar to dower*. But when the jointure is created afterward, the widow has a right to elect whether she will take the jointure or claim her dower; and she will not be required to make the election until she has had an opportunity to ascertain their respective value.

In order to bar dower, however, the jointure must be a *substantial one*, and not merely illusory. If, therefore, the widow be evicted from the lands given her in jointure, she shall have a right to claim dower from her husband's estate; and if she be evicted only in part, she shall have dower for the part which she has lost; and it is immaterial whether the eviction take place before or after the husband's death.(a)

*Art. 4.—How a jointure may be lost.*

1771. A jointure may be *lost* in various ways, the principal of which are:

1st. By a *joint deed by herself and her husband*;(b) though the husband alone cannot affect it by his acts.(c) But if the jointure be created after the marriage, the right of the wife to dower will not be barred by such a conveyance, because in that case the wife has her election after the husband's death.

2d. Though in England the wife does not lose her jointure by *elopement and adultery*, and the rule is perhaps the same in some of the United States, yet in others she will lose it for that cause.

1772. When the husband by his will devises an estate to his wife, at common law, it is no bar to her

(a) *Gervoye's Case*, Moore, 717; Co. Litt. 33 a, n. 8. See *Glegg v. Glegg*, 2 Eq. Cas. Ab. 27; *Speake v. Speake*, 1 Vern. 218.

(b) 2 Ves. 261; *Teu v. Winterton*, 1 Ves. jun. 451

(c) *Towers v. Davis*, 1 Vern. 479.

dower nor to her jointure; the latter of which is considered as coming in the place of, and having the same privileges as dower. Though in some states by statute the wife is put to her election to take under the will or her dower, but she cannot have both unless the will of the testator is manifestly that she shall have both.

§ 5.—Of an estate tail after possibility of issue extinct.

1773. By the awkward phrase of *an estate tail after possibility of issue extinct*, justified by Blackstone, is meant the estate which is thus described by Littleton,<sup>(a)</sup> “when tenements are given to a man and his wife in special tail, if one of them die without issue, the survivor is tenant in tail after possibility of issue extinct.”

This estate, says Blackstone,<sup>(b)</sup> must be created by the act of God, that is, by the death of that person out of whose body the issue was to spring: for no limitation, conveyance, or other human act can make it. For, if land be given to a man and his wife, and the heirs of their two bodies begotten, and they are afterward divorced *à vinculo matrimonii*, they shall neither of them have the estate, but be barely tenants for life, notwithstanding the inheritance once vested in them. A possibility of issue is always supposed to exist, in law, until it is extinguished by the death of the parties; even though the donees be each of them one hundred years old.

SECTION 3.—OF ESTATES LESS THAN FREEHOLD.

1774. In the first section under this chapter, having considered the estates of freehold of inheritance, and in the second, the estates of freehold not of inheritance,

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(a) Litt. § 32.

(b) 2 Bl. Com. 124.

it will be proper now to inquire into the nature of estates less than freehold. These are, 1, estates for years; 2, estates at will; and, 3, estates at sufferance.

§ 1.—Of an estate for years.

*Art. 1.—Of the nature of an estate for years.*

1775. An *estate for years* is one created by a lease for years, which is a contract for the possession and profits of land for a determinate period, by which the lessor agrees that the lessee shall have the possession and profits of the land, and the lessee or tenant promises, in return, to pay a rent or recompense for the same.

By the word *years* must be understood not two or more years, but any definite period of time. An estate is deemed an estate for years, though the term should exceed the limits of human life, as a lease for five hundred years; and it is also considered an estate for years, though it may be only for half a year, or even a less period of time.

1776. An estate for years is also called a *term of years*, a term signifying not only the limits of time, but also the estate or interest which passes for that period; because its duration or continuance is bounded, limited, and determined. Every such estate must have a certain beginning and a certain end. It matters not by what words it may have been created, when it must expire at a certain period, it is an estate for years.

1777. This estate may be of much longer duration than a life estate, and yet it is not a freehold but a mere *chattel interest*. An estate granted to a man at the age of ninety years, for his life, is a freehold, because it is uncertain when it will end or determine; while an estate for a thousand years is but a chattel interest, because its end is certain.

*Art. 2.—How an estate for years may be created.*

1778. An estate for years may be created by *deed*, or in *writing not under seal*, or by *parol*. The act of granting the estate is called a *demise*, the instrument or agreement by which it is granted, is a *lease*.

A lease is a contract for the possession and profits of lands and tenements on one side, and a recompense of rent or other income on the other. (a) The instrument is also known by the name of lease; and this word sometimes signifies the term, or time for which the estate is to last; for example, the owner of land containing a quarry, leases the quarry for ten years, and then conveys the land, "reserving the quarry until the end of the lease;" in this case the reservation remained in force until the ten years expired, although the lease was cancelled by mutual consent within the ten years. (b)

1779. This contract resembles several others in many particulars; it is like a sale, to constitute which there must be a thing sold, a price for which it is sold, and the consent of the parties as to both; so in a lease, there must be a thing leased, the price or rent, and the consent of the parties as to both. Again, a lease resembles the contract of hiring of a thing, *locatio conductio rei*, where there must be a thing to be hired, a price or compensation called the hire, and the consent or agreement of the parties respecting both.

1780. To make such contract, there must be a lessor able to grant the land; a lessee capable of accepting the grant; and a subject matter capable of being granted.

1781. Before proceeding to the examination of the several parts of a lease, it will be proper here to point out a difference between an *agreement for a lease* and

(a) Bac. Ab. Leases, *in pr.*

(b) *Farnum v. Platt*, 8 Pick. 339; 2 Bl. Com. 144.

the *lease itself*. When an agreement for a lease contains words of present demise, and there are circumstances from which it may be collected that the tenant should have an immediate legal interest in the term, such an agreement will amount to an actual lease; but although words of present demise are used, if it appear on the whole that no legal interest was intended to pass, and that the agreement was only preparatory to a future lease to be made, the construction will be governed by the intention of the parties, and the contract will be held to amount to no more than an agreement for a lease. (a)

Having made these preliminary observations, let us now consider, 1, by what words a lease may be made; 2, its several parts; 3, the formalities the law requires.

1. *By what words a lease may be made.*

1782. The most proper words to be used are "*demise, grant, and to farm let*;" these have a technical meaning and are well understood; but whenever words are sufficient to explain the intention of the parties, that the one shall divest himself of the possession and the other come into it, for a certain determinate time, whether they run in the form of a license, or covenant, or agreement, they will themselves be sufficient, and, in construction of law, will amount to a lease for years as effectually as if the most proper and pertinent words had been used for that purpose. (b)

When lands are let upon shares, for a single crop only, this does not amount to a lease, and, in that case,

(a) Doe on the demise of Coore v. Clare, 2 T. R. 739; Crabb on R. P. § 1282.

(b) Bac. Ab. Leases, etc., K; Watson v. O'Hern, 6 Watts, 362; Fiske v. Framingham, 14 Pick. 493; Maverick v. Lewis, 3 McCord, 211; Mosher v. Reding, 3 Fairf. 478; Kider v. Lafferty, 1 Whart. 314; 5 Rand. 571; 1 Root, 318.

the possession remains with the owner.(a) When, however, it is manifest by the contract that the tenant shall possess the land, with the usual privilege of exclusive enjoyment, it is the creation of a tenancy for a year, though the land be taken to be cultivated upon shares.(b)

*2. The several parts of a lease.*

1783. A formal lease in writing by deed consists of the following parts, namely: 1, the premises; 2, the habendum; 3, the tenendum; 4, the reddendum; 5, the covenants; 6, the conditions; 7, the warranty; 8, the date; 9, the seal.

But a lease is equally good though it be not formal.

*3. The form of the lease.*

1784. As to their forms, leases may be in writing under seal; or in writing not under seal; or they may be made verbally, without writing.

When the lease is under seal, it must, of course, be sealed, and it should also be signed by the parties; and whether under seal or not, it must be delivered in order to give it all its efficacy. But almost any manifestation of an intention to deliver it, will be sufficient; such a lease will carry the estate for any length of time whatever, particularly when under seal.

By the English statute of frauds of 29 Car. II., c. 3, s. 1, 2 and 3, it is declared that "all leases, estates, or terms of years, or any uncertain interest in lands, created by livery only, or by parol, and not put in writing, and signed by the party, should have the force and effect of leases or estates at will only, except leases not exceeding the term of three years, where-

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(a) *Hare v. Celey*, Cro. Eliz. 143; *Bradish v. Schenck*, 8 John. 151; *Bishop v. Doty*, 1 Verm. 37.

(b) *Jackson v. Brownell*, 1 John. 267.



upon the rent reserved during the term shall amount to two-third parts of the full improved value of the thing demised." "And that no lease or estate, either of freehold or term of years, should be assigned, granted or surrendered, unless in writing."

The principles of this statute, as far as regards parol leases, have been reenacted or adopted in most of the states of the Union.

*Art. 3.—Of the rights and obligations of a tenant for years.*

1. *His rights.*

1785. The tenant for years is entitled, 1, to the free and undisturbed use of the premises during the term; 2, to estovers; 3, to emblements.

1786.—1. In treating of the lessor's right to the rent, we considered the effects of a disturbance of the lessee's possession by the lessor, or of his eviction from the whole or a part of the demised premises. It will not now be requisite to go over the same ground.

1787.—2. Every tenant for years has incident to, and inseparable from his estate, unless restrained by special agreement, the same estovers to which a tenant for life is entitled. (a)

1788.—3. Emblements are not invariably incident to an estate for years; a lessee for years is in some cases entitled to them, but in other cases he is not so entitled. The rule is, that when the estate determines by the act of God, or of the law, between the time of sowing and reaping, the tenant shall be entitled to the crops. (b) The tenant for years is also entitled to emblements, for the same reason that he could not foresee the determination of his estate, when his term is ended

(a) *Harris v. Gosling*, 3 Harring. 340.

(b) In Pennsylvania, the tenant is entitled to the way-going crop. *Stultz v. Dickey*, 5 Binn. 285; *Dene v. Bossler*, 1 Pennsylv. 225. The rule is the same in New Jersey, *Van Dorens v. Everitt*, 2 South, 462.

by the act of another; as, where a tenant for life grants an estate for years, and afterward by his own act puts an end to the life estate.(a)

1789.—4. A lessee for years may part with his whole estate, by an assignment of his whole lease, or a part of it, by underletting a part of the premises, unless restrained by his lease. And the assignee may again assign it to others. In the first case the lessee will continue to be liable to the lessor for the rent on his covenant; but when the assignee transfers his term he will no longer be liable personally, for he never was responsible except in respect of the land.

*2. Of the obligations of the tenant for years.*

1790. The principal obligations of a tenant for years, are the following:

1. The tenant or lessee is bound to pay the rent agreed upon, and to perform all the covenants which he has undertaken to fulfil.

2. In the absence of all express agreements, the tenant is always required to do the necessary repairs;(b) he is therefore bound to put in windows or doors that have been broken by him, so as to prevent any decay of the premises, but he is not required to put a new roof on an old worn-out house.(c)

3. When a house has been destroyed by an accidental fire, neither the landlord nor the tenant is bound to rebuild, unless obliged by some special agreements to do so.(d)

(a) Crabb on R. P. § 1469.

(b) Woodf. L. & T. 244, Archb. L. & T. 188.

(c) Ferguson v. ———, 2 Esp. N. P. O. 590; Phillips v. Monger, 4 Whart. 226; Long v. Fitzsimmons, 1 Watts & Serg. 530; Caulk v. Everly, 6 Whart. 303. See Connell v. Vanartsdalen, 4 Penn. St. Rep. 364; Cleves v. Willoughby, 7 Hill, 83; City Council v. Moorhead, 2 Rich. 430.

(d) 4 Paige, 355; Fonb. Eq. B. 1, c. 5, a. 8. See generally, as to repairs, Platt on Cov. 266; Com. L. & T. 200; Com. Dig. Condition, L 12.

4. He cannot deny his landlord's title, nor can a sub-tenant do so.

5. At the end of his term, the tenant for years is bound to surrender the inheritance to the lessor, in the same order he got it, the natural tear and wear excepted.

*Art. 4.—How an estate for years may be lost.*

1791. An estate for years may be lost in several ways: 1, by destruction of the property; 2, by merger; 3, by surrender; 4, by release; 5, by forfeiture; 6, by notice; 7, by expiration of the lessor's right; 8, by judgment.

*1. By destruction of the property.*

1792. When the property has been destroyed the estate for years is lost as a matter of course; as if a piece of land were let, and by an earthquake or other calamity it should be destroyed, the owner would lose his inheritance and the tenant for years his estate, according to the rule *res perit domino*.

*2. By merger and extinguishment.(a)*

1793. A second way of losing an estate for years is by merger; as when there is a union of the freehold or fee and a term of years in one person, at the same time and in the same right, without any intermediate estate, the lesser estate is merged or drowned in the greater, because they are inconsistent and incompatible.

The estate in which the merger takes place, is not enlarged by the accession of the preceding estate; and the greater or only subsisting estate continues, after the merger, precisely of the same quantity and extent

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(a) 3 Preston on Conveyancing; Bac. Ab. Leases, &c. R.; Co. Litt. 338 b, note (4).

of ownership, as it was before the accession of the estate which was merged, and the lesser estate is extinguished.(a)

The merger is produced either by the meeting of an estate of higher degree, with an estate of inferior degree; or by the meeting of a particular estate and the immediate reversion in the same person.

### 3. *By surrender.*

1794. By *surrender* is understood the yielding up of an estate for life or years, to him who has an immediate estate in reversion or remainder, by which the lesser is merged into the greater by mutual agreement.(b) A surrender is of a nature directly opposite to a release; for the latter operates by the greater estate descending upon the less, the former is the falling of a less estate into a greater, by deed. A surrender immediately divests the estate of the surrenderer, and vests it in the surrenderee, even without the assent of the latter.(c)

The proper words of this conveyance are *surrender and yield up*; but any form of words by which the intention of the parties is sufficiently manifested, will operate as a surrender.(d) And when the lease is for less than three years, whether it be written or not, it may, it seems, be surrendered or transferred by an oral expression of assent.(e)

The surrender may be express or implied. The latter is when an estate, incompatible with the existing estate, is accepted by the tenant for life; as, if the lessee take a new lease of the same land.

### 4. *By release.*

1795. We have seen that by a surrender the estate

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(a) Preston on Conv. 7.

(b) Co. Litt. 337, b.

(c) Touchst. 300, 301.

(d) Perk. s. 607; Com. Dig. Surrender, A; Greider's Appeal, 5 Penn. St. R. 422.

(e) McKinney v. Reeder, 7 Watts, 124.

for years is destroyed by being merged in the estate in fee or the reversion; on the contrary, a release passes the fee or reversion to the releasee, by which he who holds the estate for years as the tenant holds the fee. A *release* is defined to be "a conveyance of a man's interest or right, which he hath unto a thing, to another that hath the possession thereof, or some interest therein." (a)

5. *By forfeiture.*

1796. A fifth mode of destroying an estate for years, is by forfeiture. This may happen in several ways, the principal of which are the following:

1st. When the lessee disaffirms the title of his lessor by matter of record; as, when he sues out a writ, or resorts to a remedy, which supposes him to have a higher interest in the land. (b)

2d. There is a forfeiture where the tenant disclaims the tenancy, as by attorning to a stranger, (c) or by a refusal to pay rent, on the ground that another person had ordered him not to pay it, for this is evidence of disclaimer of the tenancy, (d) but the payment of rent to a third person, without more, does not amount to a disclaimer, so as to operate a forfeiture. (e)

1797. A *forfeiture* of an estate for years may happen by a *breach of a condition*, for the lessor having the *jus disponendi*, may annex what conditions he pleases to his grant; provided they are not illegal nor repugnant to the grant itself, and upon the breach of any such express condition, he may avoid the lease. Conditions of this sort are generally inserted in leases, with a view to secure the payment of the rent, to prevent the

(a) Touchst. 320.

(b) Bac. Ab. Leases, etc. T. 2; Saunders v. Freeman, Dy. 209, pl. 21.

(c) Willison v. Watkins, 3 Pet. 49; Jackson v. Vincent, 4 Wend. 633; Montgomery v. Craig, 3 Dana, 101.

(d) Doe v. Pitman, 2 Nev. & Man. 673.

(e) Doe v. Parker, Gow, 180; 3 Pet. 49; Clark v. Everly, 8 W. & S. 232; Campbell v. Proctor, 6 Greenl. 12; 4 Wend. 633.

commission of waste, and to restrain the alienation of the estate for years, without the consent of the lessor.

1798. In order to secure himself, the lessor frequently reserves the right of *reënt*ry for breach of any such condition. Great care must be observed in making the *reënt*ry, or the whole proceeding will be null.

The most common case of making such a *reënt*ry is for the *non-payment of rent*; this kind of *reënt*ry will be alone considered in this place. Unless they have been dispensed with by the agreement of the parties, several things are required to be done by the lessor before he can *reënt*er.

1. There must be a *demand* of the rent.(a)

2. The demand must be made for the *sum actually due*, for a demand of more or less will avoid the *entry*.(b) If a part of the rent be paid, a *reënt*ry may be made for the part unpaid.(c)

3. It must be made on the *day* when the rent is due and payable by the lease, to save the forfeiture.(d)

4. It must be made a short time *before sunset*, that the money may be counted, and a receipt given, while there is light enough reasonably to do so.(e)

5. It must be made *upon the land*, and at the most notorious place of it;(f) unless a place is appointed where the rent is payable, in which case a demand must be made at such place, for the presumption is that the tenant is there to pay it.(g)

6. A demand must be made *in fact*, although there should be no person at the place of demand ready to pay it.(h)

(a) Com. Dig. Rent, D 3 a; Bac. Ab. Rent, H; 18 Vin. Ab. 482.

(b) Com. Dig. Rent, D 5; McCormick v. Connell, 6 S. & R. 151.

(c) Bac. Ab. Conditions, O 4; Co. Litt. 203.

(d) Bac. Ab. Rent, I; Com. Dig. Rent, D 7.

(e) Johnson v. Harrison, 17 John. 66.

(f) 2 Roll. Ab. 428.

(g) Com. Dig. Rent, D 6; Bac. Ab. Rent, I.

(h) Bac. Ab. Rent, I.

7. When these prerequisites have been observed by the lessor or reversioner, and the tenant neglects or refuses to pay the rent in arrear, if no sufficient distress can be found on the premises, the lessor or reversioner must reënter.(a) This is done by going openly upon the premises, before the witnesses he may have prepared for the purpose, and declaring that for want of sufficient distress, and because of the non-payment of the rent demanded, mentioning the amount, he reënters and repossesses himself of the premises.

A *tender of the rent* on the last day, either on or off the premises, will save the forfeiture; and, even when it has been incurred, the lessor may, either by his express agreement or by his acts, waive the forfeiture; as, for example, when the lessor receives rent from the lessee which has accrued since the forfeiture took place.

#### 6. *By notice.*

1799. When a tenant for years holds his estate by agreement from year to year, as long as both parties please, until there is a dissent, the estate will continue.(b) This estate may be destroyed by a notice from the lessor to the lessee to quit the premises.(c)

This *notice* is a request from the reversioner to the tenant, to quit the premises leased, and to give possession of the same to him, the reversioner, at a time therein mentioned. The requisites of this notice are, 1, that it be in legal form; 2, given by the proper person; 3, to the proper person; 4, that it be served; 5, that it be served in proper time; 6, its effects.

(a) 6 S. & R. 151; *Newman v. Rutter*, 8 Watts, 51; 1 Saund. 287, n. 16.

(b) *Lesley v. Randolph*, 4 Rawle, 123; *Bedford v. McElherron*, 2 S. & R. 50.

(c) See *Logan v. Herron*, 8 S. & R. 459; *Hanchet v. Whitney*, 1 Verm. 315; *Jackson v. Salmon*, 4 Wend. 327; *Lloyd v. Cozens*, 2 Ashm. 131; *Den v. Drake*, 2 Greene, 523; *Den v. Blair*, 3 Greene, 181; *Morehead v. Watkyns*, 5 B. Monroe, 228; *Fahnestock v. Faustenauer*, 5 S. & R. 174.

*1° The form of the notice.*

1800. It should contain a *request* from the lessor or reversioner to the tenant or person in possession, to quit the premises which he holds from the lessor, which premises must be particularly described, as being situate in the street, city, or place, or township, or county, and to deliver the same to him on a day certain, therein mentioned; generally when a lease is for a year, the same day of the year on which the lease commences, but when there is some doubt as to the time when the lease is to expire, it is proper to add, "or at the expiration of the current year of your tenancy." (a) It should be signed by the person giving it, or by some person authorized by him; dated, and directed to the tenant. The words of the notice must be clear and decisive, without any ambiguity, or giving an alternative to the tenant, as, "you are required to move, or pay ten per cent. more rent;" for if it be really ambiguous or optional, it will be invalid. (b)

*2° By whom notice must be given.*

1801. The notice must be given *by the party interested* in the premises, or by his *agent* properly appointed; (c) but if the notice be given by one who acts as an agent, it is sufficient if his authority be afterward recognized, and the notice is binding on the lessor. (d) As the tenant is to act upon the notice, at the time it is given to him, it is necessary that it should be such as that he may do so with safety, and it should be binding upon all the parties concerned at the time it was given. Where, therefore, several

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(a) Doe ex dem. Philips v. Butler, 2 Esp. N. P. c. 589.

(b) Adams on Ej. 122.

(c) Adams on Ej. 120.

(d) Goodtitle v. Woodward, 3 Bald. & Ald. 689.



persons are jointly interested in the premises, they all must join in the notice; and if any one of them be not a party at the time, no subsequent ratification by him, will be sufficient by relation to render the notice valid.(a)

3° *To whom the notice should be given.*

1802. When the relation of lessor and lessee, or landlord and tenant subsists, difficulties can seldom occur as to the party upon whom notice should be served. It should be given to the *tenant* of the party giving the notice, notwithstanding a part may have been underlet, or the whole of the premises may have been assigned;(b) unless, perhaps, the lessor has recognized the sub-tenant as his tenant, in which case the notice should be given to both.(c) When the premises are in possession of two or more joint tenants or tenants in common, the notice should be to all; a notice addressed to all and served upon one only, will, however, be a good notice.(d)

4° *Of the service of the notice.*

1803. The lessor or landlord should prepare duplicate notices, both signed by himself, so as to make them both originals, or if there are several tenants, he should make as many originals as there are tenants, and one besides, for himself; he should then procure one or more persons for witnesses, to whom he should show the notices he has prepared, and request them to compare the notices so as to be certain they are all alike. The lessor, or person acting for him, should then go with the witnesses to the tenant and deliver to him, or if he cannot be found, to a member of his family at his place of abode, or on the premises, on the

(a) 2 Phill. Ev. 184: 5 East, 491.

(b) Adams on Ej. 119.

(c) Jackson v. Baker, 10 John. 270.

(d) Adams on Ej. 123.

tenant in possession, one of the original notices thus prepared and compared.(a) For the purpose of identifying the notice, in case of a dispute, the witnesses ought to indorse on the notice kept by the lessor, the day and the manner in which it was served, and sign their names.

*5° When the notice must be served.*

1804. Different rules obtain in the several states as to the time when the notice should be given, before the expiration of the term. In some of them it must be half a year before the end of the current year;(b) in others a notice of three months is sufficient.(c)

1805. Difficulties frequently arise as to the period of the commencement of the tenancy, and when a regular notice to quit on a particular day is given, and the time when the term began is unknown, the effect of such notice as to its being evidence or not of the commencement of the tenancy, will depend upon the particular circumstances of its delivery. If the tenant being applied to by his landlord respecting the time of the commencement of the tenancy, has informed him it began on a certain day, and, in consequence of it, a notice to quit on that day is given at a subsequent period, the tenant is concluded by his act, and will not be permitted to prove that in point of fact, the tenancy has a different commencement; nor is it material whether the information be the result of design or ignorance, as the landlord is, in both instances, led into error.(d)

In like manner, when the landlord is induced by

(a) 2 Phill. Ev. 185.

(b) In New Jersey, 2 Greene, 253; 3 Greene, 181. In Kentucky, 5 B. Monroe, 228. In Vermont, 1 Verm. 315.

(c) In South Carolina, Godard v. Railroad Co., 2 Rich. 346. In Pennsylvania, Lloyd v. Cozens, 2 Ashm. 131; 8 S. & R. 459.

(d) Adams on Ej. 130; 2 Phill. Ev. 186.

the tenant to believe that the tenancy commenced at a certain time, at the time the notice is given, the tenant cannot afterward show that in fact it commenced at another time; as, where the tenant at the time of the delivery of the notice assented to its terms; but such assent must be strictly proved.(a)

6° *Of the effect of notice.*

1806. When a regular notice has been given to a tenant from year to year, its effect is to put an end to the estate of the tenant, while it is unrecalled and has not been waived. Numerous acts of the lessor will have the effect of recalling such notice; the principal of which are, 1, the receipt of rent as such accrued after the expiration of the term to which the notice applies;(b) 2, bringing an action for use and occupation of the premises after such time; 3, distraining for rent accrued afterward. These acts are conclusive upon the landlord, because they cannot be otherwise explained. But there are many acts which would have the effect of waiving the notice, but they are severally open to explanation; and the particular act will or will not be considered a waiver of the notice, according to the circumstances which attend it.(c) It has been held that a notice to quit at the end of a certain year, is not waived by the landlord's permitting the defendant to remain in possession an entire year after the expiration of the notice, notwithstanding the tenant held by an improving lease, that is, to clear and fence the land, and pay the taxes.(d)

7. *By the expiration of lessor's right.*

1807. When the lessor has the fee simple, his heirs

(a) Phill. Ev. 183.

(b) Prindle v. Anderson, 19 Wend. 391; S. C. 23 Wend. 616.

(c) Doe v. Humphreys, 2 East, 237; Whiteacre v. Symonds, 16 East, 13, See Boggs v. Black, 1 Binn. 333; Adams on Ej. 144.

(d) Boggs v. Black, 1 Binn. 333.

will be bound by all leases which he has made, whatever be their nature or their length, for as he had a right to dispose of the whole title, he might of course let the estate upon such terms as he pleased. But when a tenant for life makes a lease for a term which happens to extend beyond his life, it expires with the death of the tenant for life, for he could not make a lease to extend beyond the time for which he held the estate.

On the same principle, a guardian cannot make a lease to extend beyond the time when the ward shall attain his full age.(a)

But we may remember that when the lease expires upon the happening of an uncertain event, the tenant for years is entitled to the emblements.

#### 8. *By judgment.*

1808. An estate for years may be lost by the judgment of a competent court, when its judgment is final, in an action between the lessor and the tenant for years, where the judgment is rendered in favor of the lessor; or where a stranger recovers the land by title paramount.

#### § 2.—Of estates at will.

1809. In the next place let us consider another kind of estate in lands not of freehold, known as an estate at will. These doubtless still exist, but the courts are greatly inclined, upon all proper occasions, to treat such estates as tenancies from year to year.(b)

An *estate at will* is that which a man has in consequence of a lease of land made to him, to hold at the

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(a) *May v. Calder*, 2 Mass. 55.

(b) *Sullivan v. Enders*, 3 Dana, 66.

will of the lessor, and he enters by force of the lease and obtains possession ;(a) for unless he enter there is no tenancy.(b)

*Art. 1.—How created.*

1810. An estate at will is created either by an express agreement or by implication from the acts of the parties.

1. A letting for so many years, as the lessor and lessee could agree, was holden to be a lease at will, because of the uncertainty of the term ;(c) and where a lease for years was made containing a proviso "that the lessee might enter at his will," the tenant had but an estate at will.(d) When, from the language of the parties, it is evident that they did not intend to create a tenancy for a longer period, or for any definite time, the tenant holds at will only ; as where a farmer employs a laborer for a year, at a stipulated price per month, and agrees to provide him a house at two dollars per month, payable monthly, the laborer is a tenant at will, and, when he ceases to labor, his tenancy is determined.(e)

2. A tenancy at will may be created by implication from the acts of the parties ; a few examples will explain this. A person in possession of land, under a contract with the owner for the purchase, is a tenant at will ;(f) and a grantor continuing in possession of the granted premises after the conveyance, is tenant at the will of the grantee.(g)

(a) Litt. sec. 68 ; 2 Bl. Com. 145.

(b) Pullock v. Kittrell, 2 Tayl. 153.

(c) Bro. Leases, 13 ; 6 Co. 35.

(d) Turner v. Hodges, Het. 128.

(e) McGee v. Gibson, 1 B. Monroe, 105.

(f) Proprietors of No. 6 v. M'Farland, 12 Mass. 325 ; Love v. Edmonston, 1 Iredell, 152 ; Jones v. Jones, 2 Rich. 542.

(g) Currier v. Earl, 1 Shep. 216.

*Art. 2.—Rights and obligations of tenants at will.*

1811. Every estate at will, is at the will of both parties, landlord and tenant, and each may dissolve the connection between them at his own pleasure, but in so doing, the one is not allowed to do an injury to the other. The landlord, it is true, may determine the estate at his own pleasure, but he cannot stand by, see the tenant sow the land, and, before the crops are gathered, put an end to the tenancy and take them himself; the tenant is entitled to the emblements upon the ground that a tenant for life is entitled to them, by the uncertainty of his tenure. For the purpose of enabling him to reap the full benefit of his labor, the law allows him free ingress, egress and regress to cut and carry away the profits. But when the tenancy has been determined by the will of the tenant himself, he will not of course be entitled to enter to carry away the emblements, and they will belong to the landlord.(a)

In Pennsylvania, it has been held that after a lease has expired by its own limitation, the lessee becomes a tenant at will, and the landlord may enter upon and dispossess him, without notice to quit.(b) But it must not be literally understood, perhaps, that he is not *entitled to notice*; all that is meant is, that he is not entitled to such a notice as a tenant for years, but he is allowed a reasonable time to remove his effects and family, before he becomes a trespasser.(c)

The tenant at will is bound to pay the rent during the time he occupies the premises, when he determines the estate by his own act, but when the tenant is not bound to pay the rent and the landlord determines it

(a) Co. Litt. 55.

(b) Overdeen v. Lewis, 1 Watts & Serg. c. 90. See Hamit v. Lawrence, 2 A. K. Marsh, 366; Bedford v. McElherron, 2 S. & R. 49.

(c) Rising v. Stannard, 17 Mass. 282; Ellis v. Paige, 1 Pick. 43; Keay v. Goodwin, 16 Mass. 1.

before the time it becomes due, he cannot apportion it.(a)

*Art. 3.—Of the determination of the tenancy at will.*

1812. Though doubts were formerly entertained as to what acts amounted to a determination of an estate at will, it is now settled that the following acts will amount to such a determination :

1. An express declaration by the lessor that the lessee shall no longer hold as tenant, made either upon the land or notified to the lessee.(b)

2. The exertion of any act of ownership by the lessor, as entering upon the premises and cutting timber, or taking a distress for rent and impounding it on the land.

3. Making a feoffment or lease for years of the land, to commence immediately.(c)

4. Any act of desertion by the lessee, as assigning his estate to another, or committing waste, which is an act inconsistent with such tenure.(d)

5. The death of the lessor or lessee.(e)

6. A disclaimer by the lessee that he holds of the lessor.(f)

§ 3.—Of estates at suffrance.

1813. The most inferior of all estates is one at suffrance, which will be the subject of this paragraph. An *estate at suffrance* is where one comes into possession of land by lawful title, and keeps it afterward without any title at all.

(a) See *Leighton v. Theed*, 1 Ld. Raym. 707; S. C. 2 Salk. 413.

(b) Co. Litt. 55; 1 Ventr. 348.

(c) *Rising v. Stannard*, 17 Mass. 282.

(d) *Philips v. Covert*, 7 John. 1.

(e) 2 Bl. Com. 146; *Crabb on R. P.* § 1549; *Rising v. Stannard*, 17 Mass. 282; *Ellis v. Paige*, 1 Pick. 43.

(f) *Willison v. Watkins*, 3 Pet. 49.

A material distinction has been made between the cases of a person coming to an estate by an act of the owner, and afterward holding over, and by an act of law, and then holding over. In the first case he is regarded as a tenant at suffrance, and in the other as an abator, intruder or trespasser.

Much difference exists between a tenant at will and a tenant at suffrance; the former is always in by right, the latter enters by a lawful lease, but holds by wrong. A tenant at will has some right, and is capable of receiving a release, there being a privity between him and the lessor; but there is no such privity between a tenant at suffrance and the owner of the land.

The tenancy at suffrance is destroyed, whenever the true owner makes an entry on the land and ousts the tenant; the rights of the owner are changed by this act, for, although before entry he cannot maintain trespass, immediately afterward he can support that action against his former tenant at suffrance, for continuing on the premises.

#### SECTION 4.—OF ESTATES UPON CONDITION.

1814. Having considered the nature of estates of freehold of inheritance, and not of inheritance, and of estates less than freehold, it remains now to inquire into estates upon condition.

An *estate upon condition* is one which has a qualification annexed to it, by which, upon the happening or not happening of a particular event, it may be created, or enlarged, or destroyed.<sup>(a)</sup>

1815. There is a marked difference between a condition and limitation, which should be remembered. A condition is a provision respecting a future and uncertain event, on the existence or non-existence of

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(a) Co. Litt. 201.



which is made to depend, either the accomplishment, the modification, or the rescission of a contract or testamentary disposition. In such case the estate or thing is granted or given absolutely, without limitation, but the title to it is subject to be divested by the happening or not happening of an uncertain event. For example, a man may give an estate to his wife, provided she shall continue to reside on it; or he may give it to her upon condition that she shall not marry. The first of these conditions is lawful, and if she remove from the premises she may forfeit the estate; but the last being in restraint of marriage is void, and the wife shall take the estate unconditionally.(a)

When, on the contrary, the thing or estate is granted or given until an event shall have arrived, and not generally, with a liability to be defeated by the happening of the event, the estate is said to be given or granted subject to a limitation; as, if the estate is given *while*, or *as long as* a woman shall remain a widow, or *until* she shall marry, the estate being given to her only during the time of her widowhood, and no longer, it determines by her marriage, and all her right to it is gone.(b)

There is but little difference between a condition and a covenant, in some instances, and sometimes a clause will be holden to be both a condition and a covenant.(c)

§ 1.—Of the estates to which conditions may be annexed.

1816. Conditions may be annexed to estates in fee, for life, or for years. The following examples will make this manifest. If Primus grant you an estate

(a) See *Parsons v. Winslow*, 6 Mass. 162.

(b) Bac. Ab. Conditions, H; 2 Bl. Com. 155; Co. Litt. 236 b; 10 Vin. Ab. 218.

(c) Platt on Cov. 71.

to yourself and to your heirs, so long as you reside in the city of Philadelphia, this is a conditional fee; it is a fee because the estate may continue forever, but since its continuance depends upon your continuing to reside in Philadelphia, it is called a qualified, base or determinable fee. If, however, the estate cannot last forever, as if it has been granted while you continue in a certain occupation, it is only a conditional estate for life, but inasmuch as it may continue during the whole term of your existence, it is an estate for life. If, instead of conveying to you a grant, Primus leased to you an estate for years, on condition that you should not plough it, this would have been a conditional estate for years.

§ 2.—Of the kinds of conditions.

1817. Having fully considered, in another part of this work, the nature of conditions, it will not be required here to extend our observations in detail as to their kinds and nature. It will be sufficient to say that conditions are *express* or *implied*. The former are inserted in the deed and called *conditions in deed*; those which are implied are called *conditions in law*. Of this latter kind there are but few, if any, which operate on an estate which is granted without any express conditions. Conditions are also precedent and subsequent, possible and impossible, lawful and unlawful, copulative and disjunctive, consistent and repugnant, positive and negative, and resolutive and suspensive.

Among estates upon condition, may be included, 1, estates by statute merchant; 2, estates by statute staple; 3, estates by elegit; and 4, estates by mortgage.

*Art. 1, 2, 3.—Of estates by statute merchant, statute staple, and by elegit.*

1818. Blackstone has placed these three estates

under the head of estates upon condition.(a) They are unknown in practice in the United States. Their object, in England, was to make lands available for the payment of debts, contrary to the general policy of the feudal law. The creditor was by them authorized to take possession of the land, and, out of the profit, to pay himself. In the United States, lands are generally liable for the payment of debts.

*Art. 4.—Of mortgages.*

1819. In treating of the form of agreements, we inquired into the nature of a mortgage, not only of real but personal property. Under this head a mortgage will be considered as *an estate* granted under a condition to be void on its performance; though, in modern practice, a mortgage is in equity treated as personal estate, as far as the rights of the mortgagee are concerned.(b)

*1. Of the form of a mortgage.*

1820. A mortgage in form does not differ in any respect from a common deed of conveyance in fee, except the condition of defeasance. It must be in writing when it is intended to convey the legal title of land;(c) it is either in one deed which contains the whole contract, and which is the usual form, or it is composed of two separate instruments, the one containing an absolute conveyance, and the other a defeasance;(d) it is not requisite that the two instruments should bear the same date, as they take effect

(a) 2 Bl. Com. 160.

(b) *Erkakine v. Townsend*, 2 Mass. 495; *Briggs v. Fish*, 2 Chip. 100; *Jackson v. Willard*, 4 John. 41; *Conard v. Atlantic Ins. Co.*, 1 Pet. 386; *Dexter v. Harris*, 2 Mason, 531; *Glass v. Ellison*, 9 N. Hamp. 69.

(c) *Bowers v. Oyster*, 1 Pennsylv. 240; *Shitz v. Dittenbach*, 3 Penn. St. R. 233.

(d) *Brown v. Dean*, 3 Wend. 208; *Colwell v. Woods*, 3 Watts, 188; *Peterson v. Clark*, 15 John. 205; *Stoevers v. Stoevers*, 9 S. & R. 434; *Johnston v. Gray*, 16 S. & R. 361; *Wharf v. Howell*, 5 Binn. 499.

from their delivery; it is sufficient, if both are delivered at the same time.(a) They must, however, be of the same nature; a defeasance not under seal, will not, at law, be sufficient,(b) but the rule is different in equity.(c) It may be observed as a general rule, that whatever clauses or covenants there are in a conveyance, though they seem to import an absolute disposition, or conditional purchase, yet if, upon the whole, it seems to have been the intention of the parties that such conveyance should be a mortgage only, or pass an estate redeemable, a court of equity will construe it to be a mortgage.(d)

2. *Of the nature of mortgages and their different kinds.*

1821. Formerly, there were in England two modes of pledging land for the security and repayment of money borrowed, for the fulfilment of an obligation or a covenant.

1. The first was called *vivum vadium*. It was a conveyance of land by a debtor to his creditor to hold until the profits and rents should amount to the sum borrowed; in this case the pledge was said to be living, for on the discharge of the debt, it survived and returned to the borrower.

This is very similar to the antichresis of the Roman law, which was a species of mortgage, by which the creditor acquired a right of reaping the fruits or other revenues of the immovables given him as a hypothec, on condition of deducting, annually, their proceeds from the interest which might become due to him, and afterward from the principal of his debt.(e) Such is now the law of Louisiana.(f)

(a) *Harrison v. Phillips' Academy*, 12 Mass. 456; *Newhall v. Burt*, 7 Pick. 157.

(b) *Kelleran v. Brown*, 4 Mass. 443.

(c) *Flagg v. Mann*, 14 Pick. 467.

(d) *Vern.* 183, 268, 394.

(e) *Dig.* 13, 7, 7; *Code*, 4, 24, 1; *Code*, 8, 28, 1.

(f) *Civ. Code of Lo.* art. 3143.

2. The other mode of pledging lands was a kind of mortgage by which the fee passed to the creditor, subject to the condition of being defeated, and the title of the debtor to be resumed, on his discharging the debt at the day of payment; and if he did not, then the land was lost to him forever.(a) This is the kind of mortgage used generally in the United States.(b)

Doubtless this kind of security was derived from the Roman hypothec, though they differ essentially from each other. The hypothec resembled a lien more than a mortgage, the title to the land was not conveyed to the creditor with a defeasance, but it was simply bound for the debt; and the hypothec was not confined to the contract of the debtor, but might arise in two ways; first, by the express agreement of the debtor, which was the conventional hypothec; secondly, the implied or legal hypothec, which was created by the disposition of the law. This was nothing but a lien or privilege which the creditor enjoyed of being first paid out of the land subjected to this incumbrance; for example, the landlord had hypothec on the goods of his tenant or others, while on the premises let; a mason had the same on the house he built; a pupil or a minor on the land of his tutor or curator, who had received his money.(c)

### 3. *Of the registry of a mortgage.*

1822. In order to prevent imposition and to insure good faith, the law in perhaps all the states of the Union requires that mortgages shall be recorded or registered in certain offices, so that they may be known to all the world, and of this registry, every one who has an interest in the property mortgaged is

(a) Co. Litt. 205 a; 2 Bl. Com. 157, 158.

(b) Schuylkill Co. v. Thoburn, 7 S. & R. 419; Simpson v. Ammons, 1 Binn. 177; Wentz v. Dehaven, 1 S. & R. 317; Assay v. Hoover, 5 Penn. St. R. 21; Briggs v. Fish, 2 Chip. 100.

(c) Clef des Loix Rom. verbo Hypothèque.

bound to take notice.(a) In general, the first recorded mortgage has a preference over all others, they taking their ranks in the order of priority of recording. And when the deed of defeasance is in a separate instrument, it should also be recorded, otherwise the mortgage will appear as an absolute deed, and will, in general, have that effect except between the parties and their heirs.(b) But it has been held that both the instruments must be recorded, in order to give them validity as a mortgage against the land.(c)

By statutory provision in some of the states, the mortgage must be recorded within a certain time after it is given, in order to give it validity against the creditors of the mortgagor.(d) But although not recorded within the prescribed time, it is good against the mortgagor, for it cannot be pretended he had no notice.(e)

#### 4. *Of the rights and obligations of mortgagor.*

##### 1° *Of his rights and obligations at law.*

1823. Though the legal estate in the land be vested in the mortgagee, yet the mortgagor is considered the owner of the land, and, in equity, the mortgagee has no interest in it beyond his money.(f)

Technically considered, at law, the mortgagor has only a mere tenancy, and the mortgagee may enter immediately, and at his pleasure, unless he is restrained by an agreement to the contrary; he may, at any time, even before a default, put the mortgagor out of possession, by an ejectment. This practice,

(a) *Evans v. Jones*, 1 Yeates, 172; *Leving v. Will*, 1 Dall. 430; *Johnson v. Stagg*, 2 John. 510.

(b) *Day v. Dunham*, 2 John. Ch. R. 182.

(c) *Jacques v. Weeks*, 7 Watts, 261; *Brown v. Dean*, 3 Wend. 208; *Friedly v. Hamilton*, 17 S. & R. 70. But see *Skinner v. Cox*, 4 Dev. 59.

(d) *Stephens v. Barnett*, 7 Dana, 257; *Semple v. Burd*, 7 S. & R. 286.

(e) *Sevinz v. Will*, 1 Dall. 430; *Den v. Watkins*, 1 Halst. 445.

(f) *Brown v. Gibbs*, Prec. in Ch. 99. For this reason, the mortgagee of a term, who has not taken possession of the demised premises, is not liable for rent. *Walton v. Cronly*, 14 Wend. 63.

though general, is perhaps not universal in the United States. It is usual for the mortgagor to remain in possession, he paying the interest.

The mortgagor has no right to commit waste; and he may be prevented by injunction,<sup>(a)</sup> and in some states by a writ of *estrepement*, which lay at common law, to prevent a party in possession from committing waste on an estate, the title of which was disputed, after judgment obtained in a real action, and before possession was delivered by the sheriff.<sup>(b)</sup>

The mortgagor in possession is bound to pay the taxes and other incumbrances on the mortgaged premises, when he has conveyed with covenant of warranty.<sup>(c)</sup>

The principal obligation of the mortgagor is to pay the debt for which the mortgage was given as a security.

2° *Of the mortgagor's rights in equity.*

1824. In equity the mortgage is considered as a mere security for the debt, and only a chattel interest, and until a decree of foreclosure, the mortgagor continues the real owner of the fee, the equity of redemption being considered tantamount to the fee at law. It may, therefore, be devised by will, and it descends as an inheritance; it may be conveyed by deed as an absolute estate of inheritance at law.

3° *Of the equity of redemption.*<sup>(d)</sup>

1825. An *equity of redemption* is a right which the mortgagor of an estate has of redeeming it, after it has been forfeited at law, by the non-payment of the

(a) 3 Bl. Com. 225, 226.

(b) *Fuller v. Hodgdon*, 25 Maine, (13 Shepl.) 243.

(c) In North Carolina, with perhaps more propriety, the right of the mortgagor before forfeiture, is called a *right of redemption*; and afterward, an *equity of redemption*. 1 N. C. Rev. Stat. 266; 4 McCord, 340.

(d) See as to equity of redemption, Cruise, t. 15, c. 3; Pow. on Mortg. ch. 10 and 11; 2 Supplement to Ves. jr. 338.

money at the time required in the mortgage to be paid, by paying the amount of the debt, interest and costs.

An equity of redemption is the mere creature of a court of equity, founded on this principle, that as a mortgage is nothing more than a pledge for securing the repayment of the money to the mortgagee, it is but natural justice to consider the ownership of the land, as being still in the mortgagor, subject only to the legal title of the mortgagee, so far as such legal title is necessary to his security.

The right of redemption exists not only in the mortgagor himself, but in his heirs and personal representatives, and his assignee, and in every other person who has an interest in, or a legal or equitable title to the lands; and therefore, a tenant in dower, a jointress, a tenant by the curtesy, a remainder man and a reversioner, a judgment creditor and every other incumbrancer, unless he be an incumbrancer *pendente lite*, may redeem.<sup>(a)</sup> He who redeems, when he pays the whole debt, stands in the place of the mortgagee.<sup>(b)</sup>

#### 5. *Of the rights and obligations of the mortgagee.*

1826. We have already seen that the mortgagee is entitled to the possession of the estate, although he cannot be considered as the owner.

When he takes possession of the mortgaged premises before foreclosure, he is accountable for the actual receipts of the rents and profits, and nothing more, unless they were lost or reduced by his neglect,

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(a) See *Grant v. Duane*, 9 John. 591. See *Porter v. Read*, 1 Appl. 363. See *Killengher v. Reidenhauer*, 6 S. & R. 531.

(b) *Palk v. Clinton*, 12 Ves. 59; 2 Root, 333. When one of two joint owners of land pays off a mortgage on the land, and takes an assignment of it, the mortgage is not extinguished, but the assignee, in Pennsylvania, may sue it out and have a judgment *de terris*, as against a subsequent judgment creditor of his co-tenant. *Duncan v. Drury*, 9 Penn. St. R. 332.



or wilful default, or gross negligence.(a) Out of these rents and profits he is allowed to pay taxes, make necessary repairs, and defend the title to the estate.(b)

The mortgagee is entitled also to the payment of the money due to him and secured by the mortgage, and, if not paid when due, to a foreclosure. By *foreclosure* is meant a proceeding in chancery by which the mortgagee's equity of redemption is barred and foreclosed forever. This is done by filing a bill calling the mortgagor in a court of equity to redeem his estate presently, or, in default thereof, to be forever closed and barred from any right of redemption.

In some states, however, the mortgagee obtains a decree for the sale of the land, under the direction of an officer of the court, in which case the proceeds are applied to the discharge of incumbrances, according to their priority.(c)

When it is the practice to foreclose without a sale, its severity is mitigated by enlarging the time of redemption from six months to six months or shorter periods, according to the equity arising from the circumstances.

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## CHAPTER II.—OF THE TIME OF ENJOYMENT OF AN ESTATE.

1827. Under the first division of this title, we have considered estates as to their duration, and the quantity of interest which may be had in them. Under this head we will take a view of the time when the right of the parties to them begins. Estates are in

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(a) See *Portland Bank v. Fox*, 1 Appl. 99.

(b) See *Russell v. Blake*, 2 Pick. 505.

(c) This practice has prevailed in Indiana, Kentucky, Maryland, South Carolina, Tennessee and Virginia. In Pennsylvania, a *scire facias* is issued on the recorded mortgage, a judgment is obtained, and the land is sold under it.

possession, and not in possession; the latter are in remainder or reversion. They will be considered under three sections; 1, of estates in possession; 2, of estates in remainder; and 3, of estates in reversion.

#### SECTION 1.—OF ESTATES IN POSSESSION.

1828. An *estate in possession* is one by which a present interest passes to, and is vested in the tenant, not depending upon any future circumstance or contingency. It is sometimes called an *executed estate*, in contradistinction to one which is executory. An executed estate vests in the grantee a present and immediate right of present and future enjoyment.(a)

#### SECTION 2.—OF REMAINDERS AND EXECUTORY DEVISES.(b)

1829. A *remainder*, or an estate in remainder, may be defined to be one limited to take effect and be enjoyed after another estate, created at the same time, has been determined. For example, Primus grants to Secundus an estate for life, and, after his death, to Tertius and his heirs. The estate granted to Secundus is called the particular estate, it being only a small part, *particula* of the inheritance; the residue, or the estate granted to Tertius, is called a *remainder*. It is evident there can be no remainder without a particular estate, because remainder is a relative expression, and imports that some part has been previously disposed of.

Remainders differ from reversions in several matters: a remainder is always created by the act of the parties, a reversion arises from operation of law; the former is never limited to the grantor, while the latter

(a) Prest. on Estates, 62.

(b) See Fearn on Remainders; Cornish on Remainders; Bac. Ab. h. t.; Com. Dig. h. t.; Cruise's Dig. t. 16; 2 Bl. Com. 163, 164.

is always reserved to him and his heirs; a remainder is a part of the estate granted to another, a reversion is the reservation of the whole estate to the grantor, after the particular estate shall have expired.

This section will be divided into four heads: 1, of the creation of a remainder; 2, of the different kinds of remainders; 3, how contingent remainders may be defeated; 4, of executory devises.

§ 1.—Of the creation of a remainder.

1830. To make a good remainder there are three requisites, namely, “an estate precedent, made at the same time that the remainder commences; that the particular estate continue when the remainder vests; and that the remainder be out of the donor at the time of livery.”(a)

Remainders are created by deed, which, alone, will be here considered; and by will, known by the name of executory devises, which will occupy our attention in the fourth head of this section.

Art. 1.—Of the particular estate.

1831. A *particular estate* is one which is carved out of a larger, and which precedes a remainder; it is said to support the remainder. For example, where an estate is granted to A for years, remainder to B for life; or an estate for life to A, and remainder to B in tail: this precedent estate is called the particular estate. If an estate be made to commence at a future time, without any intervening estate, the gift is void.(b) When there is a particular estate and a remainder, the two form but one estate, the possession of the particular tenant being the possession of the remainder man.

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(a) Plowd. 25.

(b) 2 Black. Com. 166.

But the particular estate must be some certain right in the land, which is carved out of the estate, in order to create a remainder; and an estate at will, which is uncertain, trifling, and precarious, is not sufficient to support a remainder. The particular estate must be less than a fee, for after a fee there can be no remainder.

There can be no remainder limited after an estate of inheritance, unless it be after an estate tail, though there may be a future use or executory devise.

*Art. 2.—When the remainder must be created.*

1832. The remainder must commence or pass out of the grantor *at the time* of the creation of the particular estate; (a) as, when a grant is made to A for life, with remainder to B in fee; here, the remainder passes to B, at the same time that A obtains possession of his estate for life.

*Art. 3.—When the remainder must vest.*

1833. The remainder must vest in the grantee during the continuance of the particular estate, or *eo instanti* that it determines; as, if there be a lease for life, remainder to the right heirs of B, or the first son of B, if B dies or has a son in the lifetime of the lessee, the remainder will be good.

§ 2.—Of the different kinds of remainders.

1834. The rules which have been explained, have given rise to the distinction between *vested* and *contingent* remainders.

*Art. 1.—Of vested remainders.*

1835. A *vested remainder* is one by which a present

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(a) Litt. § 671.

interest passes to the party, though to be enjoyed *in futuro*, and by which the estate is invariably fixed to remain to a determinate person, after the particular estate has been spent. For example, if a grant of an estate for life be made to Primus, with remainder to Secundus and his heirs in fee, here Secundus acquires a present interest, of which he may dispose at his pleasure, though he cannot enjoy it till after the death of Primus. In this case it is apparent that the moment Primus dies, Secundus or his heirs or assigns will be entitled to the remainder, the particular estate being ended by the death of Primus. In other words, the estate is vested, that is, the remainder man has an immediate and fixed right of present or future enjoyment.

There may be many successive remainders, and the whole of them may be vested; if, for example, land be limited to Primus for life; remainder to Secundus, in tail; remainder to Tertius in fee; Secundus' remainder is vested, because if Primus should die immediately, Secundus would take; and Tertius is also vested, because if Primus should die, and also Secundus, without heirs, Tertius would take.

*Art. 2.—Of contingent remainders.*

1836. A *contingent remainder* is one which is limited to take effect on an event or condition, which may never happen or be performed, or which may not happen or be performed till after the determination of the preceding particular estate; in which case such remainder can never take effect. The doubt or uncertainty may relate to the *person* or to an *event*. Examples of these two cases will make this manifest:

1. If I grant you an estate for life, remainder to the *heirs* of your brother in fee, the heirs of your brother, being unknown till after his death, because a living man can have no heirs, *nemo est hæres viventis*,

the remainder to his heirs is contingent. If he dies before you, the remainder becomes vested in his heirs; but if he survives you the remainder does not vest at all, because by your death the particular estate is terminated, and no one answering to the description of heirs to your brother exists to take *eo instanti*, at your death. In this case the remainder is contingent, because it is limited to an uncertain person.

2. The contingency may be limited upon an uncertain event. If I grant you an estate for life, with a remainder to your brother, if he shall survive you, the remainder is contingent.

As soon as the contingency upon which the remainder depends has happened, and this uncertainty has been changed to a certainty, the remainder vests of itself in the person to whom it is limited, without any act to be done by him.(a) When it becomes vested it may be the subject of a sale, but until then the interest is but a mere possibility.

1. *Rules which govern contingent remainders.*

1837. The principal rules which govern contingent remainders are the following:

1. If the remainders amount to a freehold, they cannot be limited on an estate for years, or any other particular estate less than freehold; because in such case the freehold would not pass out of the grantor at the time when the remainder would be created, and this would make it void.(b)

2. The event upon which the contingency depends must be lawful; a remainder limited to a bastard to be begotten, or to a man who should commit a particular crime, would be void.(c)

3. The contingency or event upon which the

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(a) *Carver v. Jackson*, 4 Pet. 1.

(b) 2 Bl. Com. 171.

(c) *Cro. Eliz.* 509; *Plowd.* 32; 2 Co. 51; *Fearne, Cont. Rem.* 175, 176.

remainder is to vest, must not be such as would defeat the particular estate; as if a man grant to Primus an estate for life, with remainder over to Secundus immediately, on his paying the grantor a certain sum of money, this remainder would be void, because it would defeat the estate for life.(a)

4. The event must be a common possibility, and *potentia propinqua*, as death, or death without issue, or coverture or the like; and not a remote possibility. A remainder to a corporation which is not in being at the time of the limitation, is therefore void, although it be erected during the particular estate.(b)

#### 2. *Contingent remainders how classed.*

1838. Contingent remainders have been reduced by Mr. Fearne into four classes: 1, where the remainder depends entirely on a contingent determination of the preceding estate itself; 2, where the contingency on which the remainder is to take effect, is independent of the determination of the preceding estate; 3, where the condition upon which the remainder is limited, is certain in event, but the determination of the particular estate may happen before it; 4, where the person to whom the remainder is limited, is not yet ascertained, or not yet in being.(c)

#### *First Class.*

1839. The following is an example of the first class, where the remainder depends entirely on a contingent determination of the preceding estate itself, namely: where Primus makes a feoffment to the use of Secundus, till Tertius shall return from Rome, and after such return of Tertius, then to remain in fee; here the particular estate is limited to determine on the return of Tertius, and on that determination of it, the

(a) Fearne, Cont. Rem. 177.

(b) Fearne on Rem. 176.

(c) Ibid. 5.

remainder is to take effect, but that is an event which may possibly never happen, and therefore the remainder, which depends entirely upon the determination of the preceding estate by it, is dubious and contingent.(a)

*Second Class.*

1840. An example of the second class where the contingency, on which the remainder is to take effect, is independent of the determination of the preceding estate, is as follows: If a lease be made to A for life, and, if B die before A, remainder to C for life, here the event of B's dying before A does not in the least affect the determination of the particular estate, nevertheless it must precede and give effect to C's remainder; but such an event is dubious; it may or it may not happen, and the remainder depending on it is therefore contingent.(b)

*Third Class.*

1841. The third class includes remainders where the condition upon which the remainder is limited, is certain in event, but the determination of the particular estate may happen before it. It is a rule, as has already been observed, that a remainder must vest either during the continuance of the preceding estate, or at the very instant of its determination; so that if the event does not so happen, the remainder becomes void. Lord Coke puts the following example: If a lease be made to J S for life, and after the death of J D to remain to another in fee, this remainder is contingent; for though J D must die some time or other, yet if he survive J S, by whose death the particular estate will determine, the remainder will become void.(c)

(a) 3 Co. 20 a.

(b) 3 Co. 20 a; 10 Co. 85; Co. Litt. 378 a; Perk. s. 156.

(c) 3 Co. 20 a. See *Weale v. Lower*, Pollexf. 57.



*Fourth Class.*

1842. The fourth class of contingent remainders is where it is limited to a person not ascertained or not in being, at the time when such limitation is made; for example, if a lease be made to one for life, remainder to the heirs of Paul; now there can be no such person as the right heir of Paul till his death, for *nemo est hæres viventis*; and as Paul may not die till after the determination of the particular estate, such remainder is contingent.(a) Again, where an estate is limited to two persons during their joint lives, remainder to the survivor in fee, such remainder is contingent, because it is uncertain which of them will survive.(b)

*3. Exceptions made to these general rules.*

1843.—1. A distinction which operates by way of exception to the class of contingent remainders has been adopted: it is this. When a limitation for a long term of years, as eighty years or upward, determinable on the life of a person then in being, with remainder over on the death of that person, to a person *in esse* (as a limitation to A for eighty years, if B so long live, with remainder over after the death of B, to C in fee,) it has been held, that notwithstanding the remainder over is in this case limited to take effect on the death of B, an event which possibly may not happen till after the expiration of the particular estate for eighty years, yet as the chance against the happening of such an event before the expiration of the preceding term is exceedingly small, such remainder shall be considered as vested; and that the possibility that a life in being may endure for eighty years to come, does not amount to that degree of uncertainty

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(a) Co. Litt. 378 a; 3 Co. 10 a.

(b) Cro. Car. 102.

sufficient to constitute a contingent remainder.(a) But if the limitation had been for a term of years so short, say twenty-one years, as to leave a common possibility that the life on which it is determinable may exceed it, the remainder would then be contingent, and there must be a present particular estate of freehold to support it, and prevent the limitation over from being void as a freehold to commence *in futuro*.(b)

1844.—2. Several exceptions exist as to the generality of the rule which governs the fourth class of contingent remainders. They are as follows:

1st. The first of these exceptions arises from a rule of law, known as the *rule in Shelley's case*, which has given rise to more commentaries than perhaps any other rule ever adopted by the courts.(c) It has been expressed with great precision, though not with much elegance, to be "in an instrument, if a freehold be limited to the ancestor for life, and the inheritance to his heirs, either mediately or immediately, the first taker takes the whole estate; if it be limited to the heirs of his body, he takes a fee in tail; if to his heirs, a fee simple."(d) Such remainder is immediately executed in the ancestor taking the freehold, and it is not contingent; the possibility that the freehold in the first taker may determine in his lifetime, does not keep the subsequent limitation to his heirs from attaching to him; for when the ancestor takes an estate

(a) *Napper v. Sanders*, Hutt. 119. See Pollexf. 67; *Beverly v. Beverly*, 2 Vern. 131; *Fearne*, Con. Rem. 11.

(b) Hutt. 118; Pollexf. 67.

(c) See Co. Litt. 376, b, and Mr. Butler's note (1); 1 Preston on Est. c. 3; Cruise's Dig. t. 32, c. 22; 1 Hargr. Law Tracts, article "Observations concerning the rule in Shelley's case, chiefly with a view to the application of that rule to last wills;" 4 Kent, Com. 214, 4th ed.

(d) Co. Litt. 376, b; *Shelley's case*, 1 Co. 104. The rule in Shelley's case has been adopted pretty generally in those of the United States where the common law is the basis of their jurisprudence. *James' claim*, 1 Dall. 47; *McFeely v. Moore*, 5 Ohio, 465; *Findlay v. Riddle*, 3 Binn. 139; *Bishop v. Selleck*, 1 Day, 299; *Lyles v. Digge*, 6 Harr. & John. 364. In New York, it has been abolished. 4 Kent, Com. 232.

of freehold, and in the same conveyance there is an unconditional limitation to his heirs in fee, or in tail, either immediately, without the intervention of any estate of freehold, between his freehold and the subsequent limitation to his heirs, or mediately, with the interposition of some such intervening estate, the subsequent limitation vests immediately in the ancestor, and becomes, as the case may be, either an estate of inheritance in possession, or a vested remainder.

But in these cases the freehold in the ancestor, and the limitation to his heirs, must be in the same deed or instrument, or they will not consolidate in the ancestor; (a) and so they must be in the same right, for if the estate limited to the ancestor be merely an equitable estate, as a trust, and the subsequent limitation to his heirs carries the legal estate, the two estates will not incorporate into an estate of inheritance in the ancestor, as if they had been of one quality, that is, both legal or both equitable estates; and the limitation to the heirs will operate as a contingent remainder.

2d. The second exception to the generality of the rule contained in the fourth class is, that an ultimate limitation to the right heirs of the grantor will continue in him as his *old reversion*, and not as a *remainder*, though the freehold be expressly limited from him. (b)

3d. A third exception to the fourth class of contingent remainders arises from the respect which the law pays to the *intent of the testator*, where it can be plainly collected from his will, that he used the word heir as a *descriptio personæ*, or sufficient designation of the person for the remainder to vest; for example, where there is a limitation by special designation by will, to the heirs of a person *in esse*, as to the heirs of

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(a) Fearne on Con. Rem. \*55.

(b) Co. Litt. 22, b; Cruise's Dig. t. 16, c. 1, § 38.

the body of A, now living. The limitation is deemed to be vested in the heirs so designated by purchase, and, therefore, there is no contingent remainder in the case. The word *heirs* is here construed to be a word of purchase, and not of limitation, in order to carry out the manifest intention of the testator, which in this instance controls the general rule that, *nemo est hæres viventis*.<sup>(a)</sup>

§ 3.—How contingent remainders may be defeated.

1845. When the particular estate is determined or destroyed, before the contingency happens on which they are vested, contingent remainders become defeated or destroyed. Therefore when there is a tenant for life, with several remainders in contingency, he may, not only by his death, but by alienation, surrender, or other methods, determine and destroy his own life estate before any remainder can vest; and consequently, he defeats them all; as if there be a tenant for life, with remainder to his eldest son unborn in tail, and the tenant for life, before any son is born, surrenders his life estate, he by that means defeats the surrender in tail to his son; for his son not being *in esse*, when the particular estate determined, the remainder could not vest, and as it could not vest then, it could not vest at all.

To prevent this, a special mode of conveyance was adopted, by which a trustee was appointed to preserve the contingent remainders, in whom vested an estate in remainder for the life of the tenant for life, to commence when his estate determines. If, therefore, the estate for life determines otherwise than by death, the estate of the trustees, for the residue of his natural life, will then take effect, and become a particular

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(a) *Burchet v. Durdant*, 2 Ventr. 311; *James v. Richardson*, 2 Jones' R. 99.

estate in possession, sufficient to support the remainders depending in contingency,

§ 4.—Of executory devises.(a)

1846. An *executory devise* is such a limitation of a future estate or interest in lands as the law admits, in the case of a will, though contrary to the rules of limitation in conveyances at common law; when the object of the gift is a chattel personal, it is more properly called an *executory bequest*.(b) It is evident, from the definition, that if the limitation by will does not depart from the rules prescribed for the government of contingent remainders, in that case, it is a contingent remainder and not an executory devise.(c)

These executory devises were instituted for the purpose of supporting the will of a testator, when it was evident he intended a contingent remainder, and when it could not operate as such by the rules of law, the limitation was then considered good as an executory devise, and this favorable construction was given to wills because the testator being *inops consilii*, he could not be presumed to have acted with as much caution and foresight as he would have done in making a deed.

1847. An executory devise differs from a remainder in three material points.

1. A contingent remainder requires a particular estate to support it, an executory needs no such particular estate. This happens when a man devises a future estate to arise upon a contingency, and, till the contingency does happen, he does not dispose of the fee simple, but leaves it to descend to his heir at law;

(a) See as to Executory Devises, Com. Dig. Estates by Devise, N. 16; Fearne on Con. Rem. \*298; Cruise's Dig. Index, h. t.

(b) Fearne on Con. Rem. 298.

(c) Carwardine v. Carwardine, 1 Eden's R. 27; Doe v. Morgan, 3 T. R. 763; 1 East, R. 263; Haines v. Witmer, 2 Yeates, 400; Dunwoodie v. Read, S. & R. 440; Stehman v. Stehman, 1 Watts, 475.

as, if one devises land to a feme sole and her heirs, upon her marriage. This is in effect a contingent remainder without a particular estate to support it; a freehold commencing *in futuro*. Though this limitation would be void in a deed, yet it is good as an executory devise.<sup>(a)</sup>

2. A fee simple, or other estate, cannot, in a remainder, be limited after a fee simple, or in other words, *a remainder cannot be limited after a fee simple*; an executory devise can be so limited. This happens when the deviser devises his whole estate in fee, but limits a remainder thereon to commence on a future contingency; as, if a man devises lands to A and his heirs; and if he dies before the age of twenty-one years, to B and his heirs; this remainder, though void in a deed would be good as an executory devise.

To prevent perpetuities, a rule has been adopted in both these species of executory devises, that the contingency must happen *during the time of a life in being and twenty-one years afterward*, and the months allowed for gestation, in order to reach beyond the minority of a person not *in esse* at the time of making the executory devise.

3. A remainder cannot be limited of a *chattel interest* or term of years, after an *estate for life* has been created out of the same; an executory devise can be so created. A term of years may be given by executory devise to one man for his life, and afterward limited over in remainder to another, which could not be done by deed; for we must remember that a life estate given to a person of any age, how great soever it may be, is greater than the longest term of years, say five hundred years; a grant of it to a man for life, was, therefore, considered a total disposition of the whole term. But it was soon held that although by

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(a) 2 Bl. Com. 173; *Beard v. Rowan*, 1 McLean, 135.

an arbitrary rule such a life estate was greater than the term, yet the devisor might give the remainder by executory devise, and that the devisee for life had no power of alienating the term, so as to bar the remainder man; yet to prevent the danger of perpetuities, it was soon settled that though such remainders may be limited to as many persons successively as the devisor thinks proper, yet they must *all be in esse during the life of the first devisee*; for then, to use a figure, all the candles are lighted and consuming together, and the ultimate remainder is in reality only to that remainder man who happens to survive the rest.(a)

After having taken this general view of executory devises, we will now consider, 1, their different kinds; and 2, their limitations.

*Art. 1.—Of the different kinds of executory devises.*

1848. There are several kinds of executory devises; two relative to real estate, and one in relation to personal estate. These will be separately examined.

*First class.*

1849. When the devisor parts with his *whole estate*, but upon some contingency, *qualifies the disposition of it*, and limits an estate on that contingency. For example, when a testator devises to Peter for life, remainder to Paul in fee, provided that if James should, within three months after the death of Peter, pay one hundred dollars to Paul, then to James in fee; this is an executory devise to James, and if he dies during the life of Peter, his heir may perform the condition.(b)

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(a) 2 Bl. Com. 174, 175.

(b) 10 Mod. 419; Prec. in Ch. 486. See *Holmes v. Holmes*, 5 Binn. 252; *Mayer v. Wiltberger*, Geo. Dec. part 2, 20; *Lewis v. Smith*, 1 Ired. 145.

*Second class.*

1850. When a testator gives a *future interest* to arise upon a contingency, but does not part *with the fee* in the mean time; as in the case of the devise of the estate to the heirs of John, after the death of John; or a devise to John in fee to take effect six months after the testator's death; or a devise to the daughter of John, who shall marry Robert within fifteen years.(a)

*Third class.*

1851. The executory bequest of a chattel interest is good, even though the ulterior devisee be not at the time *in esse*, and chattels so limited are protected from the demands of creditors beyond the life of the first taker, who cannot pledge them nor dispose of them beyond his own life interest in them.(b)

*Art. 2.—Of limitations to executory devises.*1. *When limitations are too remote.*

1852. By the common law an executory devise, either of real or personal estate, is good if limited to vest within twenty-one years, after a life or lives in being; and the contingency may depend upon as many lives in being as the settler pleases, for the whole period is no more than the life of the survivor.(c) When the limitation extends beyond this, it is in general too remote and void.(d)

(a) *Bate v. Amherst*, T. Raym. 82; 1 Salk. 226. See *Chambers v. Wilson*, 2 Watts, 495.

(b) *Hoare v. Parker*, 2 T. R. 376. See *Marston v. Carter*, 12 N. H. Rep. 159.

(c) 2 Bl. Com. 174, 175; 1 Sid. 451; *Benjough v. Edridge*, 1 Simons, 173, 267.

(d) See *Moffat v. Strong*, 10 John. 12; *Guery v. Vernon*, 1 N. & McC. 69; *Jackson v. Robbins*, 15 John. 169; S. C. 16 John. 537; *Jones v. Sothoron*, 10 Gill & John. 187; *Miles v. Fisher*, 10 Ohio, 1.



In several of the states, these limitations have been regulated or modified by statute.

2. *When the limitation over is after the failure of issue.*

1853. When an executory devise is limited to take effect *on the failure of issue*, or after a first devisee's death *without heirs*, or *without issue*, or *without leaving issue*, the limitation is void as being too remote.(a)

But a distinction must be observed between a definite and an indefinite failure of issue. When the precise time for the failure of issue is fixed by the will, as in the case of a devise to Peter, but if he dies without lawful issue living *at the time of his death*, this is a failure of issue *definite*. An *indefinite* failure of issue is the very converse or opposite to this, and it signifies a general failure of issue, whenever it may happen, without fixing a time, or certain or definite period, within which it must happen. The issue of the first taker must be extinct, and the issue of the issue, *ad infinitum*, without regard to the time or any particular event.

As a general rule, when the failure of issue is definite, as where it is to happen on the death of the first taker, the limitation is not too remote, and the executory devise is valid.(b) And where the generality of the words heirs or issue is restrained by any other words, to the period allowed, the devise over will be good.(c)

The devise of a fee, with remainder over if the devisee dies without issue or heirs of his body, is a fee cut down to an estate tail, and the limitation is void by way of executory devise, as being too remote, and

(a) Cruise, Dig. t. 38, c. 17, § 23.

(b) Eby v. Eby, 5 Penn. St. R. 461; Moor v. Howe, 4 Monr. 199; Bac. Ab. Legacies and Devises, I.

(c) Cruise's Dig. t. 38, c. 17, § 24; Porter v. Bradley, 3 T. R. 143.

founded on an indefinite failure of issue.(a) But this rule will not receive its full force when there are additional expressions in the will, though but slight, which show another intention.(b)

### SECTION 3.—OF REVERSIONS.

1854. A *reversion* is the residue of an estate left in the grantor, now called the *reversioner*, to commence in possession after the determination of some particular estate granted out by him; it is also defined to be the return of the land to the grantor and his heirs, after the grant is over.(c)

An estate in reversion, like a remainder, when actually vested, is a present interest, an estate in *præsenti*, though it can only take effect in *futuro*.

#### § 1.—How a reversion is created.

1855. Unlike a remainder, which must be created by deed or devise, a reversion arises by act of law alone.

#### § 2.—In what a reversion may be had.

1856. A reversion may be had in an estate *in fee, for life, or for years*. If the owner of the fee grant a smaller estate to another, the reversion of the fee remains in him; if, having an estate for life, he grant a smaller estate, the reversion for life continues in him; if an estate for years, he grant an estate for a less number of years, the reversion for years still continues in him. In this way there may be several reversions existing in the same estate, they being severally fractions of the whole; and all these estates in reversion, together with the estate in possession,

(a) *Irwin v. Dunwoody*, 17 S. & R. 61; *Caskey v. Brewer*, 16 S. & R. 441; *Heffner v. Knapper*, 6 Watts, 18; *Ide v. Ide*, 5 Mass. 500; *Newton v. Griffith*, 1 Harr. & Gill. 111; *Bell v. Gillespie*, 5 Rand. 273.

(b) *Anderson v. Jackson*, 16 John. 382.

(c) 2 Bl. Com. 175; Co. Litt. 142 b.

make but one estate, namely, a fee simple. The reason for this is, that the fee simple of all lands must abide somewhere, and if he who has before possessed the whole, carves out of it any particular estate, and grants it away, whatever is not so granted, remains in him and his representatives.

§ 3.—Of the incidents of a reversion.

1857. The usual incidents of a reversion in England are fealty and rent.(a) In this country, fealty in this sense is unknown, and rent is not absolutely inseparable from the reversion. When the lessor leases an estate for years, reserving rent, then he has the reversion with rent; but he might sell the term for so much money in hand, and in this case he would have the reversion without the rent.

§ 4.—Of the rights of the reversioner.

1858. As the reversioner has an estate in the land, though he has not a present right of enjoyment, it follows that he may sell the reversion, or devise it by his will, and, in case of a fee, it will descend to his heirs if no will be made, or to his executors or administrators if the estate be only a chattel interest. He may separate the rent from the reversion when originally connected; for he may grant the reversion without the rent, or the rent without the reversion. When the reversion is granted without the rent, there must be an express reservation of the rent in the deed, because without such reservation, the rent will be considered as going with it. But by a simple grant of the rent the reversion does not pass.(b)

1859. Having a vested interest in the reversion, the reversioner is entitled to an action for an injury done to the inheritance, when the injury is of a permanent

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(a) 2 Bl. Com. 176.

(b) Co. Litt. 143, 151.

nature so as to affect his reversionary rights. He may bring an action on the case in the nature of waste against a stranger, while the estate is in the possession of the tenant, but trespass will not lie, because there can be no direct injury committed with force against the reversionary rights.

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### CHAPTER III.—OF THE NUMBER AND CONNECTION OF THE TENANTS.

1860. In the first division under this title, legal estates have been considered as to their duration and the quantity of interest which may be had in them; under the second, a view has been taken as to the time when the rights of the parties to them began. We will now inquire into the rights of the tenants as they are; 1, in severalty; 2, as joint tenants; 3, as tenants in common; and 4, as coparceners.

#### SECTION 1.—OF TENANTS IN SEVERALTY.

1861. An *estate in severalty* is one which is held by the tenant in his own right only, without any other person being joined or connected with him in point of interest during the continuance of his estate. This is the most usual way of holding estates, and the general rules which are laid down respecting them, apply to estates in severalty.

#### SECTION 2.—OF JOINT TENANCIES.

1862. An *estate in joint tenancy* is where lands or tenements are granted or devised to two or more persons, to hold in fee simple, fee tail, for life, for years, or at will.

§ 1.—How a joint tenancy is to be created.

1863. The *creation* of this estate depends upon the expressions used in the deed or will by which the tenants hold, for it must be created by the acts of the parties, and does not result from the operation of law; thus an estate given or granted to any number of persons, without any restrictions or explanations, will be construed to be a joint tenancy. (a) And such a conveyance to husband and wife will be considered in the nature of a joint tenancy; (b) though they do not take strictly as joint tenants or tenants in common, they being both seised of an entirety. Neither of them can sell without the consent of the other, and the whole goes to the survivor, unless restricted by statute. (c) But if the estate is granted to husband and wife and a third person, the husband and wife together take but one half, and the other joint tenant takes the other. (d)

Joint tenancies cannot arise by descent or act of law, as above observed, but only by purchase.

This estate may be created by disseisin as well as by deed. (e)

§ 2.—What property is the subject of a joint tenancy.

1864. Joint interests may be had in the title to the same land, whether it be a fee simple or any smaller estate carved out of the fee. A joint tenancy may be had not only in an estate *in possession*, but also in a *remainder* and a *reversion*. (f)

(a) Litt. § 227; Davidson v. Heydon, 2 Yeates, 459; Gilbert v. Richards, 7 Verm. 203; Martin v. Smith, 5 Binn. 16.

(b) Shaw v. Hearsay, 5 Mass. 521; Fox v. Fletcher, 8 Mass. 274; Var-num v. Abbot, 12 Mass. 474; Den v. Hardenberg, 5 Halst. 42.

(c) Rogers v. Benson, 5 John. Ch. 431; Thornton v. Thornton, 3 Rand. R. 179.

(d) Bac. Ab. Joint Tenants, B; Litt. § 291; Back v. Andrew, 2 Vern. 120; S. C. Pr. Ch. 1. See Doe v. Wilson, 4 Barn. & A. 303; Attorney General v. Bacchus, 9 Price, 30.

(e) Putney v. Dresser, 2 Met. 583, 586.

(f) Co. Litt. 183 b.

There may be a joint tenancy not only of lands and tenements, but also of chattels personal and real, such as leases for years, a horse, a ship, and the like; but this rule does not apply to partnership property, for by the law merchant, though the title to it goes to the survivor, yet the beneficial interest of the deceased partner goes to his personal representatives.

Though joint tenancies were favored by the English common law, for the purpose of preventing the diversion of feudal services, yet they are not favored in equity, because they prevent a provision for children, and bar the widow of her just dower. Therefore money loaned by two or more persons on a joint mortgage, is not considered joint property. (a)

§ 3.—Of the properties of a joint tenancy.

1865. The *nature* of a joint tenancy requires the following circumstances, namely: 1, unity of interest; 2, unity of title; 3, unity of time; and, 4, unity of possession; or in other words, joint tenants have one and the same interest; accruing by one and the same conveyance; commencing at one and the same time; and have the same possession.

*Art. 1.—Of the unity of interest.*

1866. With respect to unity of *interest*, one tenant cannot be entitled to one period of duration or quantity of interest, and the other to a different one; one cannot be tenant for life, and the other tenant for years; one cannot be tenant in fee, and the other tenant in tail. When land is limited to two tenants for their lives they are joint tenants of the freehold; when to them and their heirs, they are joint tenants of the inheritance. But it must be remembered that the joint tenancy is limited only to the estate held by the

(a) *Lake v. Craddock*, 3 P. Wms. 158; *Randall v. Phillips*, 3 Mass. 384.

joint tenants, and, if the fee has been carved out, the remainder may be vested in one of the joint tenants of the life estate; for example, when lands are granted to Peter and Paul for their lives, and the remainder to Peter in severalty; here Peter and Paul have a life estate and they are joint tenants as to that, but Peter has a remainder in the fee in severalty. In such case if Peter should die first, Paul would enjoy the life estate, and on his death Peter's heirs would be entitled to the land.

*Art. 2.—Of the unity of title.*

1867. As to unity of *title*, the estate of the joint tenants must be created by the same act or instrument, whether legal or illegal; as by one and the same conveyance, or by one and the same disseisin; for a joint tenancy cannot arise by descent, as has been already observed, but merely by purchase or acquisition of the party; and unless the act be the same, they would have different titles, and if their titles were different, one might be good and the other might be bad, which would absolutely destroy the jointure.(a)

*Art. 3.—Of the unity of time.*

1868. With respect to the unity of time, the estate must become vested in all the joint tenants at one and the same instant, as well as by one and the same title. But in this case there are several exceptions, particularly in the case of uses and executory devises. If for example, a man should make a feoffment in fee to the use of himself for life, and of such a wife as he should afterward marry, for their joint lives, he and his future wife are joint tenants, though they came to their estates at several times; the estate of the wife is in abeyance until marriage, and then it has relation

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(a) 2 Bl. Com. 181.

back, and takes effect from the original time of creation. Again, if there be a devise or limitation to the children of A, the estate may vest in joint tenancy in one, and afterward in other children as they are progressively born.(a)

*Art. 4.—Of the unity of possession.*

1869. There must also be a unity of *possession*. Joint tenants are seised *per my et per tout*; by the half or moiety, and by all; that is, each of them has the entire possession as well of every parcel as of the whole. They have not, one a seisin of one half, and the other a seisin of the other half, neither can one be seised exclusively of one acre and the other of another, but each has an undivided moiety of the whole, and not the whole of an undivided moiety. If an estate in fee be given to a man and his wife, they are not, properly speaking, joint tenants nor tenants in common; because the husband and wife are considered in law as one person, and they cannot, therefore, take by moieties, but both are seised of the entirety, *per tout, et non per my*; consequently, neither of them can dispose of any part without the assent of the other, but the whole must remain to the survivor.(b)

§ 4.—Of the rights of the joint tenants.

1870. Joint tenants have rights and powers during the tenancy, which may be exercised by them either jointly or singly; and the survivor has rights to the whole estate by virtue of the *jus accrescendi*.

*Art. 1.—Of their rights pending the tenancy.*

1871. Pending the tenancy, each of the joint tenants has a right to enter upon the land, when the tenants have a right of possession, and each may exercise at

(a) 2 Preston on Abstr. of Titles, 67.

(b) See 5 Mass. 521; 8 Mass. 274; 12 Mass. 474; 5 Halst. 42.



his pleasure every reasonable act of ownership; but one joint tenant is liable to his companion for any waste he may commit upon the estate, and they are severally accountable to each other for the rents and profits of the joint estate.

Though a joint tenant cannot devise his share of the estate, because the moment he dies his right vests in his co-tenant, and the devise must take effect after his death, yet he may sell his interest in it, and by that means the joint tenancy is severed, and his co-tenant and the alienee will thereafter be tenants in common.(a)

Joint tenants are considered as having an entire and connected right; they must, therefore, join and be joined in all actions respecting the estate.(b)

But there are many acts which one of the tenants may do for the benefit of both; such, for example, as the right to distrain, which each may do alone for the whole, because each has an estate in the whole rent.(c) When convenient, however, it is better for them to join.

*Art. 2.—Of the rights of the surviving joint tenant, or of the jus accrescendi.*

1872. Unlike tenants in common, whose estate, on the death of one of them, is divided between the survivor and the heirs of the deceased, the surviving joint tenant takes the whole of the estate himself, the heirs of the deceased not being entitled to any part of the joint property. This is called the *right of survivorship*, or *jus accrescendi*. This right is the distinguishing incident of a joint tenancy. The estate held in joint tenancy, by the common law, passed to the

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(a) 2 Bl. Com. 185.

(b) Litt. § 288.

(c) Fisher v. Wigg, 3 Salk. 207.

survivors when there were more than one, and so on to the last survivor, whether the estate in joint tenancy was a fee, or an estate for life or years, or a mere personal chattel. A joint tenant's share of the estate was not subject to the dower of his widow, and he could not devise it by his will. But the part of each joint tenant is charged with judgments or incumbrances expressly created by him.(a)

§ 5.—How a joint tenancy is destroyed.

1873. A joint tenancy may be *destroyed* either by the joint act of the two parties, or by the act of one alone. It may be destroyed by the destruction of any of its unities; or,

1st. By the destruction of the unity of *interest*; as where two persons are joint tenants for life, and the inheritance is purchased or descends upon either, it is a severance of the jointure; though when an estate is originally limited to two for life, and after to the heirs of one of them, the freehold still remains in jointure, without merging in the inheritance, because being created by one and the same conveyance, they are not separate estates, and therefore cannot merge, for to make a merger there must be a separate estate: both branches, in this case, make but one entire estate.

2d. By the destruction of the unity of *title*. If one joint tenant, therefore, alienes and conveys his estate in the tenancy to a third person, the joint tenancy is severed; for then the parties hold by different titles, and become tenants in common. It has been held that a mortgage executed by two or three joint tenants, is a severance of the joint tenancy.(b) We have seen

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(a) 2 Prest. on Abstr. 65; Remington v. Cady, 10 Conn. 44.

(b) Simpson v. Ammons, 1 Binn. 175.

that a devise of one's interest by his will has not the same effect.

3d. By the destruction of the unity of *time*. This it is scarcely possible to destroy, for it respects only the commencement of the joint estate, which is now past, and cannot be affected by future acts.

4th. By the destruction of the unity of *possession*. This unity may be destroyed by merely disuniting the possession. This may be done by a voluntary partition, when each becomes a tenant in severalty of his part. By the common law one joint tenant could not compel the others to make partition, but by the statutes 31 Henry VIII., c. 1, and 32 Henry VIII., c. 32, joint tenants are compelled to make partition of their estate. The principles of these statutes have been reenacted or adopted in most of the United States, generally with increased facilities for making partition.

§ 6.—Joint tenancies how considered in the United States.

1874. This estate is not favored in this country. The common law right of survivorship has been abolished, except as to estates held in trust, in Alabama, Delaware, Georgia, Illinois, Indiana, Kentucky, Michigan, Missouri, Mississippi, New Jersey, New York, Ohio, Pennsylvania, South Carolina, Tennessee and Virginia. In Connecticut and Louisiana, the right was never recognized.

### SECTION 3.—OF ESTATES IN COPARCENARY.

1875. When an estate of inheritance descends from the ancestor to two or more persons, it is called an estate in *coparcenary*, and the heirs are called *coparceners* or *parceners*, because they are compellable to make partition. This is usually applied, in England, in cases where the lands descend to females, when there are no male heirs.

1876. In this country estates generally descend to

children equally, and there is little or no difference between coparcenaries and tenancies in common. The title inherited by more persons than one, in some of the states, is declared expressly to be a tenancy in common, as in New York and New Jersey; and where it is not so declared, the effect is the same; the technical distinction between an estate in coparcenary and one in common is considered as essentially extinguished in the United States.

At common law the properties of parceners were in some respects like those of joint tenants. They had the same unities of *interest, title and possession*. Coparceners hold *per my et per tout*; an entry on the lands by a stranger, is, therefore, a trespass for which a coparcener may recover damages and costs.(a)

#### SECTION 4.—OF ESTATES IN COMMON.

1877. An *estate in common* is one which is held by two or more persons by unity of possession. This tenancy happens where there is a unity of possession only, although there may be an entire disunity of *interest, title or time*; for example, if there are two tenants in common of lands, one may hold his part in fee simple, the other in fee tail or for life; and in that case there is no unity of interest; one may hold by descent, and another by purchase; or one by purchase from Peter and the other from Paul, and then there is no unity of title; one's estate may have been vested fifty years, and the other but yesterday; so that there is no unity of time. The only unity is that of possession, and when that is destroyed, the tenants hold in severalty.

1878. This estate differs from one held in severalty in this, that where the estate is in common there must

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(a) *Roach v. Williams*, 2 Rep. Con. Ct. 202.

be several persons having an interest in it, (a) whereas an estate in severalty is owned by only one person. It differs from a joint tenancy, because in the latter the tenants must hold by unity of *interest, title, time* and *possession*, whereas in a tenancy in common the only unity required is that of *possession*. It is unlike a coparcenary at common law, because the coparceners acquire their title by descent only, and hold by three unities, namely, those of *interest, title* and *possession*; whereas a tenancy in common may be created by deed or will, and, in the United States, by descent, and the tenants hold by unity of *possession* only.

§ 1.—How a tenancy in common is created.

1879. This tenancy is created at common law by *express limitation, by deed or will*; the tenants may hold by several and distinct titles, or by title derived at the same time by the same deed or will, or, in the United States, by descent; and, in this respect, the law of this country differs from that of England. It may also be created by the destruction of either of the two estates of joint tenancy or coparcenary, when such destruction does not sever the unity of possession, but only some one or more of the other unities.

In several of the states joint tenancies have been changed to tenancies in common by the operation of local acts of assembly. And these legislative provisions have been held to be valid, because they did not destroy any vested right, as it was uncertain who would be the survivor, and because each of the joint tenants might himself have severed the joint estate by alienation. (b)

(a) This interest must be in the *estate*; a mere privilege reserved to a person in a dwelling house, for a particular purpose, or for a limited time, does not constitute him a tenant in common of the estate. *Abbott v. Wood*, 1 Shep. 115. See as to what right makes a tenant in common of lands, *Walker v. Fitts*, 24 Pick. 191; *Johnson v. Hart*, 6 W. & S. 319; *Wisnell v. Wilkins*, 5 Verm. 87; *Jackson v. O'Donaghy*, 7 John. 247; *Evans v. Brittain*, 3 S. & R. 135; *Caines v. Grant*, 5 Binn. 119.

(b) *Bombaugh v. Bombaugh*, 11 S. & R. 192.

## § 2.—Of the rights of tenants in common.

1880. Tenants in common are deemed to have several and distinct freeholds, and this is the principal characteristic of a tenancy in common, though they have no separate estate in any part of the land. Each is considered to be severally and solely seised of his share. They are seised *per my* but not *per tout*, and consequently, they must sue separately in actions savoring of the realty; but they must join in actions relating to some entire and indivisible thing, and in actions of trespass relating to the joint possession,<sup>(a)</sup> or for the recovery of rent by an action of debt. It is owing to this principle that where tenants in common have several estates, each one should distrain for his separate share,<sup>(b)</sup> unless the rent be of an entire thing, as to render a horse, in which case, the thing being incapable of division, they must join.<sup>(c)</sup> Each tenant in common is entitled to receive from the lessee his proportion of the rent; and where a person holding under two tenants in common, paid the whole of the rent to one of them, after having received a notice to the contrary from the other, it was held the party who gave the notice might afterward distrain.<sup>(d)</sup>

1881. As tenants in common have no original privity of estate between them, as to their respective shares, one may lease his part of the land to the other,

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(a) *Merrill v. Berkshire*, 11 Pick. 269; *Lathrop v. Arnold*, 25 Maine, 136; *Gilmore v. Wilbur*, 12 Pick. 120; *Meredith v. Andres*, 7 Iredell, 5; *Daniels v. Daniels*, 7 Mass. 135. But see *Briscoe v. McGee*, 2 J. J. Marsh, 370.

(b) Litt. §§ 311, 314, 317. See *Rehoboth v. Hunt*, 1 Pick. 224; *Decker v. Livingston*, 15 John. 479.

(c) Co. Litt. 197 a.

(d) *Harrison v. Barnby*, 5 T. R. 246. But before such notice, and before distress and avowry, one tenant in common may receive the whole rent and discharge the lessee, for then the rent is only in personalty. *Decker v. Livingston*, 15 John. 479.

rendering rent for which a distress may be made, as if the land had been demised to a stranger.(a)

Each may convey his undivided share in the estate, and this is effected in the same manner as if the tenant in common was seised of the entirety.(b) But one of them cannot convey one half of the estate by metes and bounds, so as to prejudice his co-tenants or his assignee, although it may bind him by way of estoppel.(c)

One tenant in common has a right of enjoyment of the common property, and he may therefore enter upon it without being liable to an action of trespass from the other, unless, indeed, by agreement the other has a right to occupy exclusively such part of the property as has been entered upon.(d)

1882. In general, the possession of one tenant in common, is the possession of the others, and the taking of the profits does not amount to an ouster of his companions. The possession of one tenant in common, is *prima facie* evidence of the possession of his co-tenant.(e) But one may actually oust the others, by taking possession adversely and claiming to hold in his own right: and when there are sufficient grounds to presume an ouster, the other will be driven to his action of ejectment.(f)

1883. Each of the tenants in common can compel the others to a partition; each is liable to the others

(a) Bro. Ab. tit. Distress, pl. 65.

(b) 2 Prest. on Abstr. 277.

(c) Bartlett v. Harlow, 12 Mass. 348; Griswold v. Johnson, 5 Conn. 363; Jewett v. Stockton, 3 Yerg. 492. See White v. Sayre, 2 Ohio, 110; E. Prentiss' case, 7 Ohio, part 2, p. 129.

(d) Keay v. Goodwin, 16 Mass. 1; Clowes v. Hawley, 12 John. 484.

(e) Phillips v. Gregg, 10 Watts, 158; Hall v. Matthias, 4 W. & S. 336. See Carothers v. Dunning, 3 S. & R. 381.

(f) Co. Litt. 199 b; Liscomb v. Root, 8 Pick. 376; Rickard v. Rickard, 13 Pick. 253; Galbraith v. Galbraith, 5 Watts, 146; Nichol v. McFarlane, 3 Watts, 165; Gause v. Wiley, 4 S. & R. 537; 10 Watts, 158; 4 W. & S. 336; Thomas v. Pickering, 1 Shep. 337; Colborn v. Mason, 25 Maine, 434; Story v. Saunders, 8 Humph. 663; Gill v. Fountleroy, 8 B. Mon. 177.

for waste, and each must account to the others for the profits he has received.

1884. Tenants in common and joint tenants are jointly liable for expenses incurred in making necessary repairs of a house or a mill, though this liability is limited to those parts of the common property; a co-tenant is not bound to repair a fence enclosing wood or arable land. This was effected at common law by the writ *de reparatione facienda*, but the more easy remedy, by compelling a partition when one of the tenants refuses to repair, has rendered this writ very nearly obsolete.

1885. But although tenants in common are all liable for repairs to the common property, they are not bound to pay for *buildings erected on the premises*, or for *permanent improvements* made by one of the tenants in common without their consent. Such erections and improvements, although perhaps ultimately beneficial to the estate, and though the inconvenience of paying for which might not be felt by the tenant who erected them, might ruin the other; besides that would be compelling a man to do what he was not bound to perform.(a) If such improvements have been made *bona fide*, although the expenditures are not a lien upon the land, yet, in making partition, a court of equity will first direct an account and suitable compensation, or assign to the tenant who made them, that portion of the premises where such improvements have been made.(b)

1886. Estates in common not being subject to survivorship, are, when the husband is a tenant in common, subject to the widow's dower, and when the wife is such tenant, liable to the curtesy of the husband as the other lands of the wife.(c)

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(a) *Orest v. Jack*, 3 Watts, 238; *Thurston v. Dickinson*, 2 Rich. Eq. 317.

(b) *Green v. Putnam*, 1 Barb. 500.

(c) *Crabb on R.* § 2318.



§ 3.—How a tenancy in common is destroyed.

1887. Estates in common can be dissolved only in two ways: 1. By uniting all the titles of all the tenants and all their interests in one single tenant; whether such union take place by purchase, by descent, or in any other manner; and in this case the tenant having all the title and interest becomes a tenant in severalty. 2. By making a partition of the property held in common among the several tenants, which gives them a severalty each in their own proper share.

Here close our inquiries into the nature of legal estates. In the next division will be considered the nature of equitable estates.

*Division 2.—Of Equitable Estates.*

1888. Under the last preceding division having considered the nature of legal estates, the next subject to be examined is the nature of equitable estates. An *equitable estate* is a right or interest in land, which not having the properties of a legal estate, but being merely a right of which courts of equity will take notice, requires the aid of such court to make it available. These estates may be conveniently considered under the heads of uses, trusts, and powers.(a)

CHAPTER I.—OF USES.

1889. *Use* at common law is defined to be a confidence reposed in another, who was made tenant of the land, or terre tenant, that he should dispose of the

(a) Willett v. Sanford, 1 Ves. 186.

land according to the intention of the *cestui que use*, or him for whose use it was granted, and suffer him to take the profits.(a)

The person to whom the estate is granted is called the *feoffee* or *terre tenant*, and the one for whom it was granted was denominated the *cestui que use*.

#### SECTION 1.—OF THE HISTORY OF USES.

1890. Uses were borrowed from the *fidei commissum* of the civil law. The following example of a *fidei commissum* will clearly show the resemblance of a use to it: when a testator writes, "I institute for my heir Lucius Titius," and adds, "I pray my heir Lucius Titius to deliver, as soon as he shall be able, my succession to Caius Seius."(b) When such a gift was made, it was the duty of the Roman magistrate, the *prætor fidei commissarius*, whom Bacon terms the particular chancellor for uses, to enforce the observance of this confidence.(c)

Uses were introduced into England by the ecclesiastics in the reign of Edward III. for the purpose of avoiding the statute of mortmain, by obtaining grants of lands, not to the religious houses directly, but to the use of the religious houses, and the chancellors of those times held these to be *fidei commissa*, and binding in conscience, and soon assumed the jurisdiction, which had been granted to the Roman *prætor*, of compelling the execution of such trusts in the court of chancery.

To obviate many inconveniences and difficulties, which had arisen out of the doctrine and introduction of uses, the statute of 27 Henry VIII., c. 10, commonly

(a) Plowd. 352; Gilb. on Uses, 1; 2 Bl. Com. 328; Sanders on Uses, 2; Cornish on Uses, 13; 1 Bac. Tracts, 150, 306; Co. Litt. 272; 1 Fonbl. Eq. 363; Bac. Ab. Uses and Trusts, in *princ.*

(b) Inst. 2, 23, 2; Vide Code, 6, 42.

(c) Bacon's Read. on the Stat. of Uses, Law Tracts, 315.

called the statute of uses, or the statute for transferring uses into possession, was passed. It enacts that "when any person shall be seised of lands, etc. to the use, confidence, or trust of any other person, or body politic, the person or corporation entitled to the use in fee simple, fee tail, for life, or years, or otherwise, shall from thenceforth stand, and be seised or possessed of the land, etc., of, and in the like estate, as they have in the use, trust, or confidence; and that the estate of the persons so seised to the uses, shall be deemed to be in him or them that have the use, in such quality, manner, form and condition, as they had before in the use." The statute thus executes the use, that is, it conveys the possession to the use, and transfers the use to the possession; and in this manner making the *cestui que use* complete owner of the lands and tenements, as well at law as in equity.(a)

1891. A modern use has been defined to be an estate of right, which is acquired through the operation of the statute of 27 Henry VIII., c. 10; and which, when it may take effect according to the rules of the common law, is called a legal estate; and when it cannot, it is denominated a use with a term descriptive of its modification.(b)

In the construction of this statute, the judges of the courts of common law, decided that a use could not be raised upon a use,(c) and that on a feoffment to A and his heirs, to the use of B and his heirs, in trust for C and his heirs, the statute executed only the first use, and that the second was a mere nullity. The judges also held that, as the statute mentioned only such persons as were seised to the use of others, it did not extend to a term of years, or other chattel interests of which a termor is not *seised* but only *possessed*.(d)

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(a) 2 Bl. Com. 333; 1 Saund. 254, note (b).

(b) Cornish on Uses, 35.

(c) Dyer, 155, a.

(d) Bac. Tr. 335; Poph. 76; Dyer, 369.

This rigid literal construction of the statute by the courts of law, opened, wider than before, the doors of the court of chancery.(a) This statute, thus made upon great consideration, and introduced in the most solemn manner, by a strict construction, has had no other effect than to add at most three words to a conveyance. In the exercise of this jurisdiction, courts of equity have in a great degree, wisely avoided those mischiefs which made uses intolerable. They now consider a trust estate as equivalent to a legal ownership, governed by the same rules of property, and liable to the same charges in equity, except dower, to which the other is subject at law. Trusts, which are now, in some degree at least, what uses were before the enactment of the statute of 27 Henry VIII., c. 10, are made to answer in general all the beneficial ends of uses, without their inconvenience or frauds.(b)

The *cestui que use* takes the legal estate, under the statute, according to the quality, manner and form as he had in the use.

#### SECTION 2.—OF THE DIFFERENT KINDS OF USES.

1892. In order to distinguish the nice and varying character of uses, it is proper to consider the various kinds into which they have been divided. They are, 1, springing uses; 2, shifting uses; 3, resulting uses; 4, contingent uses.

##### § 1.—Of springing uses.

1893. *Springing* uses are those which are limited to arise on a future event, where no preceding estate is limited, and do not take effect in derogation of any

(a) 1 Madd. Ch. 448, 450.

(b) Fonbl. Eq. Tr. 15; 1 Atk. 591; Bac. Ab. Uses and Trusts, part 2, in *princ.*; Fisher v. Field, 10 John. 494; 2 Bl. Com. 337. The Statute of Uses was suggested to Henry VIII. by his judges, as we learn from Brent's case, 2 Leon. 17, in order to gratify his royal taste for confiscations.

preceding interest. Example: a grant is made to Peter in fee, for the use of Paul in fee, after the fourth of July next; no use arises till the limited period. The use, in the mean time, results to the grantor, who has a determinable fee.

These springing uses, like executory devises, must be limited to take effect within the period prescribed by law to avoid perpetuities; therefore, a feoffment to the use of the right heirs of A, after the death of A, if he die without issue within a certain time, is a good future use;(a) but a dying without issue generally, without any definite time, is a void limitation.

In order to prevent perpetuities, when an estate can take effect as a remainder, it is never construed as an executory devise or a springing use.(b)

A good springing use must be limited at once, independently of any preceding estate, and not by way of remainder, for then it becomes a contingent, and not a springing use; and contingent uses are subject to the same rules precisely, as contingent remainders.

Springing uses may be raised by any form of conveyance; but in conveyances which operate by way of transmutation of possession, as a feoffment, or a deed of lease and release, the estate must be conveyed and raised out of the seisin created in the grantee by the conveyance.

There is another mode of conveyance by which uses may be raised, which operates not by transmutation of the estate of the grantor, but the use is severed out of the grantor's seisin, and executed by the statute. This takes place when there are covenants to stand seised to uses, and in conveyances by bargain and sale.(c)

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(a) 12 Mod. 39.

(b) *Goodtitle v. Billington*, 2 Dougl. 757.

(c) 4 Kent, Com. \*298, 4th ed.

## § 2.—Of shifting uses.

1894. A *shifting* use is one which takes effect in derogation of some other estate, and is either limited by the deed creating it, or authorized to be created by some person named in it. This is sometimes called a *secondary* use. The following is an example: If an estate be limited to A and his heirs, with a proviso that if B pay A one hundred dollars, on the fourth of July next, the use to A shall cease, and the estate go to B in fee; the estate is vested in A, subject to the shifting or secondary use to B in fee. Again, if the proviso be, that C may revoke the use to A, and limit it to B, then A is seised in fee, with a power in C to revoke and remit a new use.(a) Again, if a use be limited jointly to two persons not *in esse*, and the one comes to be *in esse*, he shall take the entire use; and yet, if the other afterward comes *in esse*, he shall take jointly with the former; as, if a man make a feoffment to the use of his intended wife, and of his first-born son, and he afterward marry, his wife shall take the whole use, and, if afterward he have a son, such son shall take jointly with the wife.(b)

These shifting uses must be kept within proper limits so as not to tend to a *perpetuity*, which is defined to be any limitation tending to take the subject of it out of commerce for a longer period than a life or lives in being, and twenty-one years beyond; and, in case of a posthumous child, a few months more, allowing for the term of gestation;(c) or it is such a limitation of property as renders it unalienable beyond the period allowed by law.(d) If, therefore, the object of the power be to create a perpetuity, it is

(a) Bro. Feoffm. al Uses, 339, a, pl. 30; Gilb. on Uses, 152; Crabb on R. P. § 1681.

(b) Bac. Read. Uses, 63; 1 Roll. Ab. 415, pl. 12.

(c) Randall on Perp. 48.

(d) Gilb. on Uses, by Sugden, 260, note.

void; as, where in a strict settlement a power was inserted authorizing trustees, on the birth of each then unborn tenant in tail, to revoke the uses limited to them, and to limit the estate to them for their lives, with remainders to their sons in tail, this was held to be a void power tending to a perpetuity, and repugnant to the estate limited.(a)

§ 3.—Of resulting uses.

1895. A *resulting* use is one which, having been limited by deed, expires and cannot vest; it then returns back to him who raised it, after such expiration, or during such impossibility.

When the legal seisin and possession of land is transferred by any common law conveyance, and no use is expressly declared, nor any consideration nor evidence of intent to direct the use, such use shall result back to the original owner of the estate; for it cannot be supposed that he meant to give it away. The following is an instance of a resulting use: when a man makes a feoffment to the use of his intended wife for life, with remainder to the use of her first-born son in tail; till he marries, the use results back to himself; after marriage it is executed in the wife; and, if she dies without issue, the whole results back to him in fee.(b)

§ 4.—Of contingent uses.

1896. A *contingent* or future use is one limited in a deed or conveyance of land which may or may not happen to vest, according to the contingency expressed in the limitation of such use; or it is such use as may happen in possession, reversion or remainder; for example, if land be granted to Peter in fee,

(a) *Spencer v. Duke of Marlborough*, 5 Bro. Par. Cas. 592; *Crabb on R. P.* § 1686.

(b) *Bacon on Uses*, 350; 2 Bl. Com. 335.

to the use of Paul, on his return from London, the use is contingent, because it is uncertain whether Paul will ever return.

SECTION 3.—HOW FAR THE STATUTE OF USES IS IN FORCE IN THE UNITED STATES.

1897. The principles of the statute of 27 Henry VIII., c. 10, have been generally introduced in the United States. But, as in all cases of this kind, where there are so many legislatures to reenact the provisions of a statute, and so many supreme tribunals to construe those enactments, it is impossible that they should be exactly the same, though they may bear a general resemblance.(a)

CHAPTER II.—OF TRUSTS.(b)

1898. Formerly uses and trusts were considered as being synonymous, and both are mentioned in the statute of 27 Henry VIII. We have seen that the object of that statute was to abolish uses, and that the judges construed it, in such manner, that it could execute only the first use, where property was given to several uses, and that the last use was considered as invalid, or, in other words, that a use upon a use was void; as where lands were given Primus, for the use of Secundus, for the use of Tertius; the legal seisin and possession was transferred to Secundus, and Tertius took nothing. In this case courts of equity supported the rights of Tertius, and held that the property was a

(a) See 4 Kent, Com. 299, 4th ed.; 1 Hill, Ab. c. 21, § 2; Laurens, Jenney, 1 Speers, 356; Matthews v. Ward, 10 Gill & John. 443; Bryan v. Bradley, 12 Conn. 474; Welch v. Allen, 21 Wend. 147.

(b) Bac. Ab. Uses and Trusts; Vin. Ab. Trusts; Com. Dig. h. t.; Cruise, Dig. tit. 12; Lewin on Trusts and Trustees; Willis on Trusts; 1 Browne's Civ. Law, 190. For the origin of trusts in the civil law, see 5 Toull. Dr. Civil Français, liv. 3, t. 2, c. 1, n. 18.



trust for him, and enforced his rights accordingly. In fact, uses were in these cases thus revived under the name of trusts. A trust is therefore a use not executed by the statute of 27 Henry VIII.

In its general sense, a *trust* is an equitable right, title, or interest in property real or personal, distinct from its real ownership; or it is a personal obligation for paying, delivering or performing any thing, where the person trusting has no real right, or security, for by that act he confides to the faithfulness of those intrusted; this is its most general meaning, and includes deposits and other bailments. In a technical sense, when applied to real property, a *trust estate* may be described to be a right in equity to take the rents and profits of lands, the legal estate of which is vested in some other person; or it is the disposition which one makes of property in favor of one person through the instrumentality of another, who is required to complete it.

1899. The person to whom the legal estate is granted or devised is called the *trustee*, and he for whose benefit it is so granted or devised is denominated the *cestui que trust*.(a)

We will now briefly consider, 1, the different kinds of trusts; 2, how a trust is created; 3, the trustee; 4, the *cestui que trust*; 5, the destruction of trust estates.

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(a) This awkward phrase to denominate *him who trusts* is in the old Norman French language. It has been justly objected to as being an ungainly phrase which might be substituted by the word *beneficiary*, or *fide commissary*. In the Roman laws the trustee is called the *heres fiduciarius*, and the *cestui que trust* is denominated *heres fidei commissarius*. Doctor Halifax has translated it *fide committee*. Hal. Anal. of Civil Law, 34, 46. Judge Story prefers *fide commissary*, as equally at least within the analogy of the English language. 1 Story on Eq. Jur. § 321, note. Bowyer uses the word *fidei commissary*. Mod. Civ. Law, ch. 25, p. 150. Professor Walker, in his Intro. to American Law, 311, and Judge Story, loc. cit. prefer the term *beneficiary*, as being the best adapted for the purpose, and most in analogy with the language. Almost any term might be substituted for the one now in use. In the French law, the *cestui que trust* is called *fidei commissaire*.

## SECTION 1.—OF THE DIFFERENT KINDS OF TRUSTS.

1900.—1. Considered as to their nature, trusts are divided into simple and special.

1. A *simple* trust corresponds with the ancient use, and is where property is simply vested in one person for the use of another, and the nature of the trust, not being qualified by the settler, is left to the construction of law.

2. A *special* trust is where a trustee is interposed for the execution of some purpose particularly pointed out, and the trustee is not, as before, a mere passive depositary of the estate, but is required to exert himself actively in the execution of the settler's intention; as where the conveyance to trustees is upon trust to re-convey, or to sell for the payment of debts. These special trusts have again been subdivided into *ministerial* or *instrumental* and *discretionary*. Of the first class are those which demand no further exercise of reason or understanding, than every intelligent agent must necessarily employ; as to convey an estate. Those of the second class are such as cannot be duly administered without the application of a certain degree of prudence and judgment; as when a fund is given to trustees to be distributed in certain charities to be selected by the trustees.

1901.—2. When examined as to the *manner of their creation*, trusts are express or implied.

1. *Express* trusts are those which are created in express terms in the deed, writing or will. The term to create an express trust will be sufficient, if it can be collected upon the face of the instrument, that a trust was intended. Express trusts are usually found in preliminary sealed agreements, such as marriage articles, or articles for the purchase of land; in formal conveyances, such as settlements, terms of years, mortgages, assignments for the payment of debts, raising portions or other purposes; and in wills and

testaments, when the bequests involve fiduciary interests for private benefit or public charity.

2. *Implied* or *resulting* trusts are those which, without being expressed, are deducible from the nature of the transaction, as matters of intent; or which are superinduced upon the transaction by operation of law, as matters of equity, independently of the particular intention of the parties,<sup>(a)</sup> These implied trusts greatly extend over the business and pursuits of men; a few examples will make this manifest.

1st. When land is purchased by one man in the name of another, and the former pays the consideration money, the land will in general be held by the grantee in trust for the person who so paid the consideration money.<sup>(b)</sup>

2d. When real property is purchased out of partnership funds, and the title is taken in the name of one of the partners, he will hold in trust for all the partners.<sup>(c)</sup>

3d. When a contract is made for the sale of land, in equity the vendor is immediately deemed a trustee of the estate for the vendee; and the vendee a trustee of the purchase money for the vendor; and by this means there is an *equitable conversion* of the property.<sup>(d)</sup>

4th. When land is purchased with trust money, a resulting trust arises in the person entitled to it; in other words, the trust fund can be followed.<sup>(e)</sup>

5th. When land is conveyed to a stranger, without any consideration, there is a resulting trust to the

(a) Bac. Ab. Uses and Trusts, part 2, (c), Bouv. ed.

(b) Com. Dig. Chancery, 3 W. 3; 2 Fonbl. Eq. Tr. b. 2, c. 5, § 1, note (a); Story, Eq. Jur. § 1201; Jackman v. Ringland, 4 Watts & Serg. 149.

(c) Montague on Partn. 97, n.; Colly Partn. 68; Powell v. Manuf. Co., 3 Mason, 347; 4 Desaus. 486; 3 Litt. 399; 2 Wash. C. C. R. 441.

(d) Fonbl. Eq. Tr. b. 1, c. 6, § 9, note (t); Story, Eq. Jur. §§ 789, 790, 1212.

(e) Ryal v. Ryal, Amb. 413. See Wallace v. Duffield, 2 Serg. & Rawle, 521.

legal owner; in conformity to the old doctrine, that where a feoffment was made without a consideration, the use resulted to the feoffor.(a)

6th. Where the legal estate is conveyed to a trustee, and the trust is declared as to part only, nothing being said of the rest; that which is not disposed of, results to the original owner.(b)

7th. It is a rule that where the whole of an estate is conveyed for particular purposes, or upon particular trusts only, which by accident or otherwise cannot take effect, a trust will result to the original owner or his heirs.(c) But in a case of this kind there are several exceptions. If Primus devised lands to Secundus, to sell to Tertius, for the particular advantage of Tertius, that advantage is the only purpose to be served, according to the intent of the testator; and it is satisfied by the mere act of selling, let the money go where it will.(d)

8th. Where a person makes a conveyance of the legal estate to trustees, upon such trusts, and such intents and purposes as he shall appoint, and never makes an appointment, there will be a resulting trust to him and his heirs.

9th. When, in consequence of a fraud, a conveyance of land is obtained, the grantee in such conveyance will be considered in equity as a trustee for the person who has been defrauded.(e)

1902.—3. Trusts as to their *effects* are said to be executed and executory. But this must be understood in a limited sense, for in an enlarged meaning all trusts are executory.(f)

(a) *Norfolk v. Browne*, 1 Ab. Eq. 381; *Prec. in Ch.* 20.

(b) *Lloyd v. Spillet*, 2 Atk. 150; *Davidson v. Foley*, 2 Bro. 203.

(c) *Jackman v. Ringland*, 4 Watts & Serg. 149,

(d) *Hill v. Epis.* London, 1 Atk. 618.

(e) *Lloyd v. Spillet*, 2 Atk. 150; *Rutherford v. Ruff*, 4 Desaus. 350; 1 Paige, 47; 1 Cooke, 166.

(f) *Jervoise v. Duke of Northumberland*, 1 J. & W. 570; *Exel v. Wallace*, 2 Ves. 323.

1° A trust *executed* is where the limitations of the equitable interest are complete and final, as when the legal estate passes in a conveyance to Primus for the use of Secundus; or when only an equitable title passes, as in the case of a conveyance to Primus for the use of Secundus, in trust for Tertius. In this last case the trust is executed in Tertius, though he has not the legal estate.(a)

2° A trust is *executory* where the limitations of the equitable interest are not intended to be complete and final, but merely to serve as minutes or instructions for perfecting the settlement at some future period.(b)

#### SECTION 2.—HOW A TRUST IS CREATED.

1903. This section will be divided into the consideration of, 1, the formalities requisite to be observed in the creation of a trust; 2, the words by which it may be declared.

##### § 1.—Of the formalities requisite to be observed in the creation of a trust.

1904. It will be proper to examine the nature of trusts as they stood at common law, and afterward, as they are affected by the statute of frauds.

1. By *the common law* a trust of land might have been declared by parol, as where an estate was conveyed unto and to the use of A and his heirs, a trust might have been raised by parol in favor of B.(c) But a trust was not permitted to be raised by parol in contradiction to any expression of intention, on the face of the instrument itself.(d)

(a) 1 Preston on Estates, 190.

(b) Lewin on Trustees, 48, 49, 50. See *Dennison v. Gochring*, 7 Penn. St. R. 177.

(c) See *Ballasis v. Compton*, 2 Vern. 294; 3 Bro. C. C. 587; *Sprague v. Woods*, 4 Watts & S. 192.

(d) *Lewis v. Lewis*, 2 Ch. Rep. 77.

2. By the English *statute of frauds*, 29 Charles II., c. 3, s. 7, it is enacted, that "all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect."

Let us briefly examine what interest in lands, etc., are within the act, and, next, what formalities are to be observed in the declaration of trust.

*Art. 1.—Of the interests within the statute.*

1905. The words of the statute are, "lands, tenements and hereditaments;" these undoubtedly include chattels real,(a) but chattels personal do not come within them.(b)

*Art. 2.—Of the declaration of trust.*

1906. It is not required by the statute that trusts should be necessarily declared in writing, but only to be "manifested and proved" by writing; for, where there is written evidence of the existence of such trust, the danger of parol declarations against which the statute was directed, is effectually removed.(c) Any subsequent acknowledgment of the trustee, however informally or indirectly made, as by a letter under his own hand,(d) his answer in chancery,(e) or

(a) *Skett v. Whitmore*, Freem. 280; *Foster v. Hale*, 3 Ves. 696.

(b) *Bayley v. Boulcott*, 4 Russ. 347.

(c) *Foster v. Hale*, 3 Ves. 707; *Fisher v. Field*, 10 John. 495. In Pennsylvania the trust may be established by parol. *Miller v. Pearce*, 6 Watts & Serg. 97. But see *Leshey v. Gardner*, 3 Watts & Serg. 314; *Simple v. Coulson*, 9 Watts & Serg. 62; in such case the evidence should be plain and unambiguous. *Slocum v. Marshall*, 2 Wash. C. C. 397; *Peebles v. Reading*, 8 S. & R. 492; *Hoge v. Hoge*, 1 Watts, 163.

(d) 3 Ves. 696.

(e) *Hampton v. Spencer*, 2 Vern. 288.

by a recital in a deed,(a) will be sufficient. But then they must clearly relate to the subject matter of the trust, for if the trust is not so clearly ascertained from the papers, it cannot be enforced. And when it is established by an answer in chancery, the terms of it must be regulated by the whole answer as it stands, and not to be taken from one part of the answer to the rejection of another.(b) These declarations are generally made by a formal deed executed by the trustee, in which the trusts are specially set forth.

The statute of frauds, so far as it is now under consideration, has been adopted or reenacted in most of the United States, with certain modifications. In North Carolina, the law is the same on this point as it was in England before the passage of the statute of frauds, and a parol declaration of trust of land is valid.(c)

A trust, as we have seen, in the next preceding section, may be created by implication.

§ 2.—By what words a trust may be declared.

1907. A trust may be created by any words which make the meaning of the party clear and definite, there being no technical or particular set of words required for the purpose. When he makes use of technical words only, they will be construed in a legal sense ;(d) if, however, a testator use other words which manifestly indicate what his intention was, and show to a demonstration that he did not mean what the technical words import in the sense which the law has imposed upon them, that intention must prevail, notwithstanding he has used such technical words in other parts of his will.(e)

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(a) *Deg v. Deg*, 2 P. Wms. 402.

(b) 2 Vern. 288.

(c) *Foy v. Foy*, 2 Hayw. 131. See *Miller v. Pearce*, 6 Watts & Serg. 97.

(d) *Hodgson v. Ambrose*, 1 Dougl. 340 a.

(e) *Barr's Estate*, 2 Penn. St. R. 428 ; 1 Dougl. 340 a.

It is not requisite that the words should be imperative, as, "I order and direct," but terms of recommendation will be sufficient to create a trust; as, "I hope," "I do not doubt;" and precatory words will have the same effect, as, "I desire," "I will," "I entreat," and "I most earnestly beseech." (a)

### SECTION 3.—OF THE TRUSTEE.

1908. The trustee must be capable of executing the trust; he is entitled to certain rights, and liable to certain obligations.

§ 1.—Who may be a trustee, and who is so considered.

1909. All persons, *sui juris*, are capable of being trustees, (b) and even a married woman may act in that capacity, though she may be discharged if her husband is abroad and not within reach of the process of the court. (c) An infant may also be appointed trustee, and the trust shall not fail in consequence of his appointment, though there is a stronger reason against his serving as trustee than against a married woman, because she has capacity and he wants it. (d) A husband may be a trustee for the benefit of his wife, if duly appointed. (e) But trusts are not confined to the care of living persons; corporations may also act in the capacity of trustees. (f)

1910. Not only those persons who are actually appointed trustees, will be so considered; equity converts all persons seised of, or acquiring the legal

(a) Bac. Ab. Legacies. B.

(b) Commissioners v. Walker, 6 How. Mis. 143.

(c) Lake v. De Lambert, 4 Ves. 595. See the Commissioners v. Walker, 6 How. Mis. 143.

(d) Hearle v. Greenbank, 3 Atk. 712; 1 Ves. 305.

(e) Porter v. Bank of Rutland, 19 Verm. (4 Washb.) 410.

(f) Phillips' Academy v. King, 12 Mass. 546; Vidal v. Girard's Ex'rs. 2 How S. C. R. 127.



estate, who are aware of the trust,(a) into trustees; but a purchaser for a valuable consideration, without notice, is not so considered;(b) and on the death of the trustee, the heir, executor or administrator becomes the legal owner, and bound by the trust,(c) and so will be an assignee of a bankrupt or insolvent.(d)

§ 2.—Of the rights of the trustee.

1911. The legal estate may be vested in a trustee by express words, as when land is granted or devised to A and his heirs, to the use of A and his heirs, in trust for B and his heirs; for by this form of limitation the trustee is in by common law, and the use and the possession, which constitute the legal estate, are both vested in him by the statute; but when lands are given to trustees upon special trusts, it then becomes doubtful whether an entire or a partial disposition have been made to them, as when the limitation is to A and his heirs, upon trust to pay the rents to B, this has been held to give them the legal estate, and in the case of wills, the whole depends upon the testator's intent.

1912. The legal estate also vests in trustees, where it is given to them to sell or mortgage for the payment of debts,(e) or to convey an estate,(f) or to

(a) *Thompson v. Wheatley*, 5 Sm. & Mar. 499. In a case where the purchaser of the land had no notice of a trust, and he afterward sold to another, who knew the land had been held in trust, the latter's title was not affected by the fact that he had notice. *Bracken v. Miller*, 4 Watts & Serg. 102.

(b) 2 Freem. 43. pl. 47; *Payne v. Compton*, 2 Y. & C. 457; *Nash v. Cutler*, 19 Pick. 67; *Crane v. Keating*, 13 Pick. 339. See *Stiver v. Stiver*, 8 Ohio, 217; *Scott v. Gallaher*, 14 S. & R. 333.

(c) *Cole v. Moore*, Moor, 806; *Rogers v. Ross*, 4 John. ch. 388.

(d) *Bennet v. Davis*, 2 P. Wms. 316; *Twelves v. Williams*, 3 Whart. 485.

(e) *Steel v. Henry*, 9 Watts, 528.

(f) *Garth v. Baldwin*, 2 Vez. 646; *Doe v. Field*, 2 B. & Ad. 504.

support contingent remainders,(a) or to hold for the use of a *feme covert*, is a trust, and not a use executed.

1913. Unlike the right which a feoffee had in the land which he held for the use of another, a trustee cannot incumber the estate by suffering a judgment, and the trust estate is not liable to the dower of the wife, or the curtesy of the husband of a female trustee. The trustee holds the legal estate only for the benefit of the *cestui que trust*.(b)

§ 3.—Of the obligations of the trustee.

1914. With regard to the duties of the trustees it is held, in conformity to the old law of uses, that *pernancy of the profits, execution of estates, and defence of the land*, are the three great properties of a trust, so that courts of chancery will compel trustees—

1. To permit the *cestui que trust* to receive the rents and profits of the land;

2. To execute such conveyances, in accordance with the provisions of the trust, as the *cestui que trust* shall direct;

3. To defend the title to the land in any court of law or equity.(c)

It is scarcely possible in an elementary work to give all the rules in relation to the duties and obligations of trustees. In many cases, it is not easy to say what those duties are; it often becomes highly proper, and indeed, indispensable for his security, that a trustee, before he acts, should seek the aid of a court of equity.(d)

One of the principal obligations of a trustee is to render a just and true account of the trust, and when he has received money belonging to the *cestui que trust*, to pay it over.

(a) *Biscoe v. Perkins*, 1 V. & B. 485.

(b) 1 P. Wms. 278; 2 P. Wms. 318.

(c) *Cruise's Dig.* t. 12, c. 4, s. 4; 2 Story, Eq. Jur. § 1268, 1269.

(d) 2 Story, Eq. Jur. § 1267; *Fonbl. Eq. book* 2, c. 7, § 2, and note (c).

Trustees are required to act toward the trust property with reasonable diligence; to prevent waste or delay, or injury, to trust property; to keep the *cestui que trust* notified, as far as practicable, of all facts which it may be his interest to know; and where the trustee has not the proper information to seek it, and, if practicable, obtain it.(a)

Whenever special instructions are given by the instrument, or special duties are imposed upon the trustee, he must of course obey those instructions faithfully. He is bound also to perform the incidental obligations which are implied and not expressed.

§ 4.—Of the liabilities of joint trustees.

1915. In general, trustees are responsible only for their own acts, and not for the acts of each other, unless they have made some agreement by which they have agreed to be bound for each other, or they have by their own voluntary coöperation or connivance, enabled the other to accomplish some known object in violation of the trust.

A joint trustee is not responsible even when he executes jointly with the other in a receipt for the purchase money of land, or for the satisfaction of a debt, unless the money has been received by him, though executors are placed upon different grounds.

The difference between joint executors and joint trustees as to their liabilities, is this. Trustees have all equal power, interest and authority, and cannot act separately as executors may, but must join in conveyances and receipts. One trustee cannot sell without the other, or be entitled to receive more of the consideration money, or be more a trustee than the other. He must, therefore, join in the receipts, and it would be against justice to make him responsible,

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(a) *Walker v. Symons*, 3 Swanst. 58, 73.

unless, besides joining in the receipt, he has done some other act, or been in some default or neglect.(a) Executors, on the contrary, can act independently of each other, are not compellable to join in a receipt, to discharge the debtor of the estate; when they join, then it must be considered as their voluntary act, and equivalent to an admission of their willingness to be jointly accountable for the money which may have been received by one of them.(b)

§ 5.—Of the removal of trustees.

1916. When, in consequence of fraud, gross negligence, or wilful departure from their duty, loss has happened or is likely to happen to the trust estate, courts of equity will remove trustees, and substitute new ones, and they will also supply the places of those who have become incapable of acting.(c) Indeed, they will exercise this power when the trustees have become enemies to each other and cannot act together, if the estate is likely to sustain a loss.(d)

SECTION 4.—OF THE CESTUI QUE TRUST.

1917. This section will be divided by considering, 1, who may be a *cestui que trust*; 2, his rights.

§ 1.—Who may be a *cestui que trust*.

1918. In general any person who is capable of taking the legal estate directly and immediately to himself, may acquire a beneficial interest in the same estate. A *feme covert*, an infant, and even a person unborn may be a *cestui que trust*, for, in the latter case, whenever he comes into existence and capable of taking, his rights will accrue.

(a) 1 Fonbl. Eq. B. 2, c. 7, § 5; *Fellows v. Mitchell*, 1 P. Wms. 83, and Cox's note; 1 P. Wms. 241, n.

(b) 1 Fonbl. Eq. B. 2, c. 7, § 5; *Murrell v. Cox*, 2 Vern. 570.

(c) 2 Fonbl. Eq. B. 2, c. 7, § 1, note (a); *Ellison v. Ellison*, 6 Ves. 663.

(d) Com. Dig. Chancery, 4 W. 7; *Uverdale v. Ettrick*, 2 Chan. Cas. 130.

§ 2.—Of the rights of the *cestui que trust*.

1919. The *cestui que trust* is entitled to the whole beneficial interest, and the trustee is considered in equity only as an instrument. It is a rule in equity that no act of the trustee shall be allowed to prejudice the *cestui que trust*, and benefit himself. But sometimes some such acts are binding on him, when third persons are concerned; as, for example, when the trustee sells the trust estate as his own to a stranger, without notice of the trust.

A *cestui que trust* has the *jus habendi* and the *jus disponendi*, and though at law he has neither the *jus in re* nor the *jus ad rem*, yet in equity he has both. (a) He is entitled to the permanency of the profits, and also to the possession of the estate, in all cases where he is the only person interested, and the duties of the trustees do not render it necessary for them to retain the possession. (b)

He may convey his interest at his pleasure, as if he were the legal owner, without the technical forms essential to pass the legal estate; and an assignment or conveyance of an interest in trust will carry a fee, without words of limitation, when the intent is manifest. (c)

Executed trusts are enjoyed with the same advantage to the owner as if they were legal estates, and the *cestui que trust* may consequently dispose of them and devise them exactly as if they were legal estates, without the intervention of the trustee.

## SECTION 5.—OF THE DESTRUCTION OF THE TRUST ESTATE.

1920. The trust estate may be destroyed in several

(a) *Smith v. Wheeler*, 1 Mod. 17; Bac. Ab. Uses and Trusts, (M.)

(b) See Chanc. Prec. 415; *Elliott v. Armstrong*, 2 Blackf. 198; *Waggener v. Waggener*, 3 Moor, 545; *Miller v. Bingham*, 1 Ired. Eq. R. 423; *Starke's Lessee v. Smith*, 5 Ohio, 455.

(c) 2 Blackf. 198.

ways: 1, by the sale of the estate by the trustee as his own to a stranger for a valuable consideration, without notice of the trust; but in this case the trustee is answerable to the *cestui que trust* for the value of the estate; 2, it may be destroyed by merger, as when the legal and equitable estates being coëxtensive and commensurate, meet in the same person, the trust or equitable estate is merged in the legal; (a) as, if the wife have a legal and the husband the equitable estate, and they have an only child to whom both estates descend, and who dies intestate, the two estates having united, the descent will follow the legal estate. (b)

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CHAPTER III.—OF POWERS. (c)

1921. In the two preceding chapters the nature of equitable estates has been considered under the heads of uses and trusts. Connected with the subject are powers, which will form the object of the present chapter.

The word *power* has a very extensive meaning. It is either *inherent* or *derivative*. The former is the right, ability, or faculty of doing something without receiving that right, ability, or faculty from another. The people have the power to form a government, or to change one already established; a father has the legal power to chastise his son; a master, his apprentice.

*Derivative* power is an authority by which one person enables another to do an act for him; as to sell land, to execute a deed, to make a contract, or to

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(a) In the matter of *Dekay*, 4 Paige, 403; *Nicholson v. Halsey*, 1 John. Ch. R. 422.

(b) *Goodtitle v. Wells*, Dougl. 741; *Selby v. Alston*, 3 Ves. 341.

(c) See *Powell on Powers*; *Sugden on Powers*; *Com. Dig. Poirar*; *Bac. Ab. Uses and Trusts*, (G); *Vin. Ab. h. t.*; 2 *Lilly's Ab.* 339; 4 *Kent, Com.* 316; *Cruise's Dig. tit. 32*; *Crabb on Real Prop.* § 1958 et seq.

manage a particular business. Powers of this kind were well known to the common law, and were divided into two sorts: *naked powers* or bare authority, and *powers coupled with an interest*; there is a material difference between them. In the case of the former, if it be exceeded in the act done, it is entirely void; in the latter it is good for so much as is within the power, and void for the rest only.

But the powers which are the subject of this chapter are of another sort; they are derived from the statute of uses. A power, in this sense, may be defined to be an authority, enabling a person, through the medium of the statute of uses, to dispose of an interest in land, vested either in himself or another person,<sup>(a)</sup> or it is an authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the owner granting or reserving such power might himself have lawfully performed.

1922. Powers differ from trusts in several particulars. Powers are never imperative, they leave the act to be done at the will of the party to whom they are given; trusts, on the contrary, are always imperative, and binding upon the conscience of the party entrusted.<sup>(b)</sup> Again, where there is a mere power of disposing, and that power is not executed, a court of equity cannot execute it; but when a trust is created and the execution fails by the death of the trustee, or by accident, such a court will execute the trust.<sup>(c)</sup> But when a power possesses the qualities of a trust, it will be considered as a trust.<sup>(d)</sup>

He who confers the power is called the *donor*; he who is to execute the power is the *donee*; and he in

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(a) Sugd. on Pow. 83; Parker v. Clere, Mo. 567; Sir E. Clere's case, b. Co. 17, b; See 10 Ves. jun. 265.

(b) Shelton v. Homer, 5 Metc. 462; Wilmot's Opin. 23.

(c) Brown v. Higgs, 8 Ves. 570.

(d) Steel v. Henry, 9 Watts, 529; Alexander v. McMurray, 8 Watts, 504.

whose favor the power is to be executed is the *appointee*.

This chapter will be divided into three sections: 1, of the different kinds of powers; 2, how they are created; 3, how they are executed.

#### SECTION 1.—OF THE DIFFERENT KINDS OF POWERS.

1923. These powers, when considered in a particular point of view, may be variously classified: 1, as to their authority, they are powers of appointment or of revocation; 2, as regards their extent, they are naked powers or powers coupled with an interest; 3, as to their strength, they are restraining and enabling powers; 4, as they relate to the estate, they are collateral or relative.

##### § 1.—Of the powers of revocation and appointment.

1924. In general a power of appointment includes in it a power of revocation, for when an estate is conveyed to the donee for a certain purpose, with a power of appointment, he has the power to defeat the use before created, and that is a revocation. This power is incident to the power of appointment, although no express power of revocation be reserved in the deed creating it,<sup>(a)</sup> unless it appears that an immediate execution of the power, once for all, was intended.<sup>(b)</sup>

##### *Art. 1.—Of the power of appointment.*

1925. A *power of appointment* is properly a power to limit to a use, and an appointment in pursuance of a power operates under the statute not directly as a conveyance of the land, but as a substitution of a new use, in the place of the former one; indeed such an

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(a) *Adams v. Adams*, Cowp. 651.

(b) *Piper v. Piper*, 3 My. & Keen, 159.



appointment is ranked as a species of conveyance.(a) An *appointment*, in its most extended sense, being a limitation of uses, is applicable to every power by which property is modified, and includes every species of power which has that effect, as the powers of leasing, selling, exchanging or charging, which are usually reserved in settlements. But in a more restricted sense, the power of appointment is a power by which the donee is enabled to appoint an estate, however large, as distinguished from other powers to give limited or particular estates.

1926. This power of appointment is either general, or limited and qualified.

1. A *general* power of appointment is that which authorizes the donee to appoint any person he may think proper; it is a species of ownership.(b) But the donee is not considered the owner when, on the default of the exercise of this power, there is a limitation over.(c)

When the power is general for such uses as the donee shall appoint, without any limitation over, this gives him such dominion over the estate, that he may appoint himself or any other person, and liberate the estate entirely from every species of limitation inconsistent with the fee.(d)

2. A *particular* or qualified power of appointment, unlike a general power, only enables the party to appoint among a particular description of objects; as a power to appoint among a man's own children, or the children of another.

1927. The *execution* of the power of appointment must be made in such a manner as to come within the

(a) *Scrafton v. Quincy*, 2 Ves. 413.

(b) *Butl. Co. Litt.* 271 b, n.

(c) *Boyce v. Walter*, 9 Dana, 482.

(d) *Halsey v. Hales*, 7 T. R. 194; *Throughton v. Throughton*, 3 Atk. 656. See *Bentham v. Smith*, Cheves, Eq. R. 33; *Haslin v. Kean*, 2 Taylor's R. 279; *Flintham's Appeal*, 11 S. & R. 16.

spirit of the authority given. And although at law the rule only requires that some allotment, however small, shall be given to each person, when a class is mentioned as being the objects of the power, the rule in equity differs, and requires a real or substantial portion to each, and a mere nominal appointment is deemed *illusory* and fraudulent. When the distribution is left to the discretion of the donee or appointer without any prescribed rule, to *such* children as he may choose, he may appoint one only; (a) but if the words *among* the children as he shall think proper, each must have a share, and the doctrine of illusory appointments applies. (b)

1928. When there has been a *complete* execution of a power, and something, *ex abundanti*, added, which is improper, the execution is good, and only the excess is void; but it would be otherwise if there had not been a complete execution of the power, or where the boundary between the excess and execution is not distinguishable; thus, where there was a legacy given to the testator's granddaughter A, of £4000, with power to bequeath the same to the testator's grandchildren as she pleased, but to no other person, and, in default of such appointment, the testator gave the money among the grandchildren generally; and A, by her will, reciting the power, and in execution thereof bequeathed the £4000 to B, a grandchild of the testator, with a request to give a specified part of it to persons *not grandchildren*, and on her failure to do so bequeathed it over to another grandchild, with a similar request, the appointment to B was held to be absolute for the whole sum, being a complete execution of the power, and that the condition was void. (c)

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(a) *Kemp v. Kemp*, 5 Ves. 857.

(b) *Vanderzee v. Aclom*, 4 Ves. 771; 2 Vern. 513; Sugd. on Powers, 488.

(c) *Warner v. Howell*, 3 Wash. C. C. Rep. 12.

*Art. 2.—Of the power of revocation.*

1929. At common law, powers of revocation in deeds were unknown; they sprang up after the statute of uses, from which they derive their effect. This power, as before observed, is included in the power of appointment, unless under special circumstances.

A power of revocation is incident to some instruments and to others not. In general, when a naked authority is reserved in the instrument, as a letter of attorney and the like, the power is revocable; for a man cannot by any words make a mere warrant or authority irrevocable.(a)

In an instrument creating an interest in land, a distinction must be observed between a deed and a will. When a power is once executed by deed, there being no power reserved by that deed to revoke or alter it, a subsequent limitation by another deed will be void; for the rule is, that the first deed and the last will shall operate; till his death the testator has a right to change or alter his will and revoke all the powers he has given.(b)

1930. Revocations of power may be express or implied.

1. When the power of revocation is created by *express* words, no particular form is requisite, for if the intention be clear, the expression will be construed so as to support the intention.(c)

2. *Implied* revocations of powers are those which arise by operation of law from the acts of the parties; when the donee of a power does an act of a nature irreconcilable with the existence of a former use, as, for example, when a man having power to revoke, limits new and other uses, the limitation of such other uses being inconsistent, will be construed a revocation,

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(a) Vignior's case, 8 Co. 82 a.

(b) Hatcher v. Curtis, 2 Freem. 61.

(c) Co. Litt. 237 a; Oxon (Bp.) v. Leighton, 2 Vern. 376.

although the deed creating the power be not recited.(a)  
And where the power of revocation is reserved, a devise of the estate inconsistent with the deed will also operate as a revocation.(b)

§ 2.—Of naked powers and powers coupled with an interest.

1931. As regards their extent, powers are either *naked* or *coupled with an interest*.

1. The distinction between a naked power and a power coupled with an interest, depends upon whether the power is collateral to, or flows from the interest; for, if it be of the former kind, then the two are as unconnected as if they were vested in different persons;(c) therefore, although both an interest and a power pass to a married woman, yet, if the power is collateral to the interest, it is then a naked power and may be executed by her.(d)

2. A power *coupled with an interest*, must give the donee a present interest or a future one in the land; for where the power is so annexed to the estate that its execution must operate upon it, it is properly a power coupled with an interest. The estate on which the power acts must be in the donee, so that he acts in his own name; if the estate has never passed to him, he must act in the name of the party giving the power in whom the estate is vested; and, to be valid, it must be such an act as would be valid if executed by the donor; it is, therefore, revocable at his death.(e) An instance of a power coupled with an interest, may be mentioned, as the case of a mortgagee, which is not

(a) 2 Roll. Ab. 263; Scrope's case, 10 Co. 143.

(b) Guy v. Dormer. T. Raym. 295.

(c) Hess v. Hess, 5 Watts, 187; Mansfield v. Mansfield, 6 Conn. 559; 4 Whart. 27; 7 Watts, 386; 2 Rawle, 420.

(d) Godolphin v. Godolphin, 1 Ves. 21. See Jackson v. Davenport, 18 John. 295.

(e) Hunt v. Rousmanier, 7 Wheat. 204.

revocable by the death of the mortgagor.(a) A beneficial interest is not, however, required to create a power coupled with an interest; the estate of a trustee, executor, or guardian, is sufficient for that purpose.(b)

A naked power is distinguished from one coupled with an interest in this respect, that it never survives; and therefore a naked power given to two to sell, and one dies, cannot be executed by the survivor; but it is otherwise where there is a power coupled with an interest, as in the case of trustees.(c)

§ 3.—Of restraining and enabling powers.

1932. When the donor of the power, who is the owner of the estate, imposes certain restrictions by the terms of the powers, these restrictions are called *restraining powers*. *Enabling powers* are those which confer upon persons not seised of the fee, the right of creating interests to take effect out of it; which could not be done by the donee of the power, unless by such authority.

§ 4.—Of collateral and relative powers.

1933. Powers are divided into two great divisions, namely, those which relate to the land, and those which are collateral to it. The former are called *relative powers*, and the latter *collateral powers*.

*Art. 1.—Of relative powers.*

1934. Powers relating to the land are those given to some person having an interest in it, over which they are exercised. These again are subdivided into powers *appendant* and in *gross*.

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(a) *Bergen v. Bennett*, 1 Cain. Cas. Er. 1.

(b) 1 Caine's Cas. Er. 16.

(c) *Bowyer v. Judge*, 11 East, 288. As to the power of executors to sell when one of them dies, see Sugd. on Powers, 162, 167.

1. A *power appendant* is when a person has an estate in land, with a power of revocation and appointment, the execution of which falls within the compass of his estate; as, when a tenant for life has a power of making leases in possession.

2. A *power in gross* is where a person has an estate in the land, with a power of appointment, the execution of which falls out of the compass of his estate, but notwithstanding, is annexed in privity to it, and takes effect in the appointee, out of an interest appointed in the appointer; for instance, where a tenant has power of creating an estate, to commence after the determination of his own, such as to settle a jointure on his wife, or to create a term of years to commence after his death; these are called powers in gross, because the estate of the person to whom they are given, will not be affected by the execution of them.

*Art. 2.—Of collateral powers.*

1935. *Collateral powers* are those which are given to mere strangers, who have no interest in the land; as where *cestui que vie* devises that his feoffees shall sell his land, here the power to sell is merely collateral to the power in the land, for the feoffee takes no interest in the land itself, but is barely empowered to sell and dispose of an interest out of the land.

SECTION 2.—HOW POWERS ARE CREATED.

1936. In order to create powers, there must be, 1, a proper instrument; 2, sufficient words; 3, a proper object. These will be considered in three divisions, and in the fourth, will be examined the incidents of a power.

§ 1.—By what instrument a power is created.

1937. A power may be created by deed, either in

the body, or by indorsement on it, before execution, or by a deed of settlement, and there need be no counterpart of the deed.(a) It may also be created by devise. All that is required is, that the intention be properly declared ; for the creation, execution, and destruction of powers all depend upon the intention of the parties.

§ 2.—Of the words requisite to create a power.

1938. No precise form of words is requisite to create or reserve a power, any words signifying the intent will be sufficient;(b) nor is it material in what part of the instrument the power is inserted;(c) even a recital or preamble of a deed may operate as a good reservation of power.(d)

§ 3.—Of the objects for which a power may be created.

1939. A power may be reserved to revoke the whole settlement, or even a particular limitation in the settlement, leaving the other limitations unaffected. A power may also be reserved to raise concurrent interests for different purposes ; as powers to a tenant for life to grant a jointure to his wife, and to create a term, to commence from his death, for securing younger children's portions ; in which case during the continuance of the jointure, the term will not take effect in point of interest, but shall go on in time, and the residue of the term remaining unexpired after the death of the jointress shall take effect in interest, and no more.(e)

No power to create a perpetuity is valid.(f)

(a) *Fitz v. Smallbrook*, 1 Keb. 134. See *Griffin v. Stanhope*, Cro. Jac. 458.

(b) *Anon*, Mo. 608.

(c) *Rex v. Eaitington*, 4 T. R. 177.

(d) *Fitzgerald v. Fauconberge*, Fitz. 207.

(e) *Edwards v. Slater*, Hardr. 410.

(f) *Spencer v. Marlborough*, 5 Bro. Parl. Cas. 592 ; 1 Eden, 404.

## § 4.—The incidents to powers.

1940. It is a rule that a power cannot be delegated by the donee to another, whether the power relates to the land, or is collateral to it, for it is a maxim that *delegatus non potest delegare*.(a) But this must be understood where there is no authority to delegate the power; for where there is an express authority given, even a naked power may be delegated.(b)

## SECTION 3.—OF THE EXECUTION OF POWERS.

1941. This section will be divided into four parts: 1, of the capacity of the donee; 2, of the mode of execution; 3, of the extent of the execution; 4, of its effect.

## § 1.—Of the capacity of the donee.

1942. Every person lawfully capable of disposing of an estate actually vested in himself, may exercise a power over land, or direct a conveyance of that land.

In general, an infant or a married woman may execute a purely naked power, and, in the latter case, without the consent of her husband, whether the power was given to her before she was married or since. But if the power be given to her to be executed "being sole," she cannot execute it during coverture. And even one found by inquest to be an habitual drunkard, may execute a power.(c)

1943. A naked authority given to several persons does not survive; accordingly by the common law, when a testator by his will directed his executors by

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(a) *Parker v. Kett*, 1 Salk. 96; *Withers v. Yeadow*, Rich. Eq. R. 324; *Shankland v. The Corporation*, 5 Pet. 395.

(b) *Palliser v. Ord*, Bunb. 166.

(c) *Still v. McKnight*, 7 W. & S. 244. See Sugd. on Powers, c. 3.



name, to sell, and one of them died, the others could not sell, because the words of the testator could not be satisfied.(a) The statute of 21 Henry VIII., c. 4, gave the power to those executors who accepted the trust to sell, though one or more of the others should refuse to act. The principles of this statute have been reenacted or adopted generally in this country.(b)

§ 2.—Of the mode of executing powers.

1944. A power must be executed according to the requirements of the instrument creating it. It may be by deed only, or by will, or in the alternative by will or by writing. When the power must be executed by deed, it cannot be executed by will, except where equity interposes to aid a defective execution of a power.(c) When the power given is to be executed by will, it cannot be by an act *inter vivos*.(d)

Although a power must be executed according to the provisions of the instrument creating it, yet, if something be done beyond the requirements of the instrument, it will not invalidate the execution, if the power has been properly executed, and the excess will be rejected.(e)

On the other hand, if less is done than the power authorizes, it may sometimes be good; as, where the power was to sell the estate, it was held a sufficient authority to mortgage.(f)

§ 3.—Of the extent of the execution of powers.

1945. We will consider, 1, cases when the donee

(a) *Peter v. Beverly*, 10 Pet. 533; *Osgood v. Franklin*, 2 John. Ch. 19; Co. Litt. 112.

(b) *Zeback v. Smith*, 3 Binn. 69; *Hunt v. Ferris*, 15 John. 346.

(c) *Harker v. Harker*, 3 Harring. 650; *Darlington v. Pultney*, Cowp. 260; *Follett v. Follett*, 2 P. Wms. 489.

(d) *Williamson v. Beckham*, 8 Leigh, 20; *Knight v. Yarboro*, Giln. 32; *Bentham v. Smith*, Cheves, Eq. R. 33; *Morris v. Owen*, 2 Call, 520; *Reid v. Shergold*, 10 Ves. 370.

(e) *Warner v. Howell*, 3 Wash. C. C. R. 12.

(f) *Lancaster v. Dolan*, 1 Rawle, 248.

has no interest in the estate, and the power is not referred to; 2, cases when the donor has an interest in the estate.

*Art. 1.—When the donee has no interest.*

1946. In order to give validity to a conveyance or devise, made by a man who has a power to limit uses, and no power to convey the land, but conveys or devises the land generally, and the circumstances required to the execution of the power as to subscription, witnesses, etc., are observed, the conveyance shall inure as a limitation of the use, because otherwise it would be void.(a) And for the same reason where a man having several powers, but no estates actually vested in him, makes a general disposition which can only take effect as an execution of at least one of the powers, it shall be deemed an execution of all the powers.(b)

When there has been a particular disposition of an estate, it will be deemed to be in exercise of such of the powers as authorize the act.(c) On the same principle, where a man has a power of revocation, and does an act which can operate only as an exercise of it, and all the incidental circumstances prescribed by the proviso are observed, the act shall be deemed an execution of the power, although no reference whatever is made to it.

But although a power may be executed without reciting it, or taking the slightest notice of it, yet the donee must mention the estate or interest he intends to dispose of.

When a man having several powers refers to some, and executes them formally, that is an argument

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(a) 6 Co. 17; Mo. 476; Cro. Eliz. 877; Cro. Jac. 31.

(b) Roscommon v. Fowke, 4 Bro. P. C. 523; Allison v. Kurtz, 2 Watts, 188.

(c) Fitzgerald v. Fauconberge, Fitzg. 207.

against any other being executed by general comprehensive words in the same instrument.(a) But when the intention of a party to execute his power can be collected from other circumstances, it will be sufficient to the power.(b)

*Art. 2.—When the donee has an interest.*

1947. When a man has a power and an interest, and does an act generally as owner of the land, without reference to his power, the land shall pass by virtue of his ownership. Having a grantable estate and also a power to limit to use, when he grants the land itself, without reference to his authority, it implies his intent to grant an estate as owner of the land, and not to limit a use in pursuance of his power.

Whether the act shall be considered as an execution of a power, or a conveyance of an estate, depends upon the *intention* of the party: for example, where a man having several powers over different estates, and also interests in them, recites the power over one estate, and executes it in a formal manner, and then recites, not that he has a power to appoint the other estates, but that he is seised of it in fee, and accordingly conveys his interest in it by lease and release, the latter estate will be held to pass out of his interest, and not by force of his power, simply on the apparent intention not to execute the power.(c)

§ 4.—Of the effect of the execution of powers.

1948. This head will be divided into the consideration of, 1, the operation of the instrument executing

(a) *Attorney General v. Vigor*, 8 Ves. jun., 256. See *Allison v. Kurtz*, 2 Watts, 188.

(b) *Bennet v. Aburrow*, 8 Ves. 616; *Bradish v. Gibbs*, 3 John. Ch. 551. See *Robbins v. Bellas*, 4 Watts, 256.

(c) See *Maundrell v. Maundrell*, 7 Ves. jun., 567; 10 Ves. jun., 246; *Hay v. Mayer*, 8 Watts, 209.

the power; 2, the manner in which the estates created take effect in regard to each other.

*Art. 1.—Effect of the instrument executing a power.*

1949. The power may be exercised in a variety of modes, namely, by an act *inter vivos*, as a grant, bargain and sale, lease and release, covenant to stand seised, or feoffment; or by a will. In every case the instrument operates strictly as an appointment or declaration of use, and as a use cannot be limited upon a use, the grantee, etc., takes the legal estate, the appointment being made to him; and if any ulterior use is declared, it operates merely as a trust in equity.

1950. But a distinction must be made between the effect of a deed and of a will. A will not only operates as an execution of the power, but also, in most respects, partakes of the quality of a proper will. When a power of revocation is not reserved in a deed executing the power, the instrument is irrevocable; but this does not hold good as to a will, for although in truth it is not strictly a will, but simply a declaration of use, yet it so far retains the properties of a will as to be ambulatory till the death of the testator, and consequently revocable without any express power reserved for the purpose,<sup>(a)</sup> it being a rule that the first deed and the last will shall have effect.

*Art. 2.—How estates created under a power take effect with regard to each other.*

1951. In general, estates created by the execution of a power, take effect precisely in the same manner as if created by the deed which raised the power; it is not by the deed or will of the appointer that he

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(a) *Hatcher v. Curtis*, 2 Freem. 61.

acquires a title, but by virtue of the deed creating the power.(a) For this reason, although a husband cannot at common law convey directly to his wife, yet he may make an immediate appointment to her.(b) But the rule that the estate, under the power, takes effect under the deed creating the power, applies only to certain purposes, and as between the parties, it cannot impair the intervening rights of strangers to the power.(c)

1952. Having considered in the immediately previous title the nature of legal estates, and, in this, the peculiarities and effects of equitable estates, here will end our labors upon this subject.

### TITLE III.—OF TITLE TO REAL ESTATE.

1953. The title to things real will next be the subject of our inquiries. *Title* is defined by Sir Edward Coke(d) to be the means whereby the owner of lands hath a just possession of his property: *Titulus est justa causa possidendi id quod nostrum est.*

1954. Titles are viewed differently at law from what they are in equity.

1. At law, there are several stages or degrees requisite to form a complete title to lands and tenements, for if we analyze a title, we will find, 1, the lowest and most imperfect degree of title is the *mere possession*, or actual occupation of the estate, without any apparent right to hold or continue such possession;

(a) *Roach v. Wadham*, 6 East, 289.

(b) See *Latch*, 44; 2 Wils. 402.

(c) *Marlborough v. Godolphin*, 2 Ves. 78; *Southby v. Stonehouse*, 2 Ves. 610. See *Jackson v. Davenport*, 20 John. 537, 550.

(d) Co. Litt. 345.

this happens when one man disseises another.(a) 2. The next step to a good and perfect title, is the *right of possession*, which may reside in one man, while the actual possession is not in himself but another. This right of possession is of two sorts; an *apparent* right of possession, which may be defeated by proving a better; and an *actual* right of possession, which will stand the test against all opponents. 3. The mere *right of property*, the *jus proprietatis*, without either possession or right of possession.

To make a complete title, the party must have the right of possession joined to the right of property, which is denominated a double right, *jus duplicatum*, or *droit droit*.

2. In equity a title is either good, marketable, doubtful or bad.

1st. A *good title* is that which entitles a man by right to a property or estate, and to the lawful possession of the same.

2d. A *marketable title* is one which a court of equity considers to be so clear, that it will enforce its acceptance by a purchaser. The ordinary acceptation of the term *marketable title*, would convey but a very imperfect notion of its legal and technical import.

To common apprehension, unfettered by the technical and conventional distinction of lawyers, all titles being either good or bad, the former would be considered marketable and the latter unmarketable. But this is not the way they are regarded in courts of equity, the distinction taken there being, not between a title which is absolutely good or absolutely bad, but between a title which the court considers to be so clear that it will enforce its acceptance by a purchaser, and one which the court will not go so far as to declare a bad title, but only that it is subject to so much doubt

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(a) 2 Bl. Com. 195.

that a purchaser ought not to be compelled to accept it.(a) In short, whatever may be the opinion of the court as to the goodness of the title, yet if there be a reasonable doubt either as to a matter of law, or fact involved in it, a purchaser will not be compelled to complete his contract, or to accept of such title. And although such a title may be perfectly secure and unimpeachable as a holding title, it is said, in the current language of the day, to be unmarketable.(b)

The doctrine of marketable titles is purely equitable and of modern origin.(c) At law every title not bad is marketable.(d)

3d. A *doubtful title* is one which a court of equity does not consider to be so clear that it will enforce its acceptance by a purchaser, nor so defective as to declare it a bad title, but only subject to so much doubt that a purchaser ought not to be compelled to accept it.(e) At common law, doubtful titles are unknown; there every title must be good or bad, as has been already observed.

4th. A *bad title* is one which conveys no property to the purchaser of an estate. This, of course, will not be sufficient to entitle a seller to a specific performance of the contract, or to damages for the breach of it.

1955. Title to real estate may be acquired in several ways. Blackstone reduces them to two, namely, by *descent*, when the title is vested in a man by operation of law, as where a person seised of real estate dies, the estate descends to his heirs, who thereby acquire a title; and by *purchase*, where the title is vested in him by his own agreement, which accordingly

(a) *Burnell v. Brown*, Jac. & Walk. 168.

(b) *Atkinson on Mark. Tit.* 2.

(c) *Atkins. on Mark. Tit.* 26.

(d) *Romilly v. James*, 6 Taunt. 263; *Maberly v. Robins*, 5 Taunt. 625; S. C. 1 Marsh. 258. See *Dalzell v. Crawford*, 1 Penn. Law Journ. 17.

(e) 1 Jac. & Walk. 568; 9 Cowen, 344.

includes not only a buying, but a devise, a gift and a grant, for in each of these cases the devisee, the donee and the grantee must do something to complete his title; namely, to accept the devise, gift or grant.

This division of the manner of acquiring title to real estate does not appear to be entirely correct; the title gained by escheat, forfeiture and merger, is acquired by act of law, as well as title by descent. A more natural classification would be by considering, first, when the title to estates is acquired by act of law; secondly, when by acts of the parties.

Among the first, would be classed descent, escheat, forfeiture, merger; under the second class, alienation, devise, occupancy, prescription, and custom, treated of under two divisions.

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*Division 1.—Of titles acquired by operation of law.*

CHAPTER I.—OF DESCENTS.

1956. *Descent*, or hereditary succession, is the title whereby a person on the death of his ancestor, acquires the estate of the latter as his heir at law. The person who acquires title to the estate is called the *heir*, and the estate is denominated the *inheritance*.

It will be proper to consider, 1, who may be the heir; 2, of consanguinity and affinity; 3, of the estates which descend; 4, of the rules of the law of descent.

SECTION 1.—WHO MAY BE THE HEIR.

1957. An heir is one born in lawful matrimony, who succeeds by descent, right of blood, and by act of God, to lands, tenements and hereditaments, being an estate of inheritance. Under the word heirs, are



included the heirs of heirs *in infinitum*.(a) According to many authorities, *heir*, in the singular number, may be *nomen collectivum*, as well in a deed as in a will, and operate in both in the same manner as *heirs* in the plural number.(b) In wills, in order to effectuate the intention of the testator, the word *heirs* is sometimes construed to mean next of kin,(c) and children,(d) but this is not its true technical meaning.

All free persons, even minors, lunatics, persons of insane mind, and the like, may transmit their estates as intestates, *ab intestato*, and inherit from others.

The child in its mother's womb is considered as born for all purposes for its own interest; it takes by descent since its conception, provided it be capable of inheriting at the moment of its birth. Nevertheless, if the child conceived be reputed born, it is only in the hope of its birth; it is necessary that the child should be born alive, for it is presumed when it is dead born that it never had life. This is the doctrine of the Roman as well as of the common law.(e) *Non nasci, et natum mori, pari sunt. Mortuus exitus non est exitus*.(f) A person cannot claim an inheritance, therefore, through a child who was conceived but was dead born. The doctrine laid down by Chancellor Kent,(g) that "for all beneficial purposes of heirship, a child in *ventre sa mere*, is considered as absolutely born," must be confined to those children afterward born alive, and probably the learned author so meant to be understood.

By the common law, monsters are incapable of inheriting; but although deformed, if they have human shape, they may be heirs.

(a) Co. Litt. 7 b, 9 a, 237 b; Wood's Inst. 69.

(b) 1 Roll. Ab. 253; 10 Vin. Ab. 233; Sed vide 2 Prest. on Estates, 9.

(c) *Horseman v. Abbey*, Jac. & Walk. 388.

(d) Amb. 273.

(e) Dig. 50, 16, 129.

(f) Co. Litt. 29 b. See 2 Paige, 35; Domat, liv. prél. t. 2, s. 1, n. 4, 6.

(g) 4 Com. 412, 4th ed.

Our definition of heir shows that the child must be born in lawful matrimony; a bastard, therefore, has no inheritable blood in him by the common law; but in several states by statutory provision they may inherit when acknowledged by their parents, for then they are considered as legitimate.

1958. Before leaving this subject, it is proper to notice a difference in the meaning of the word *heir* as it is understood by the common and by the civil law. By the Roman law the term heirs was applied to all persons who were called to the succession, whether as devisees, or by operation of law. The person who was created universal successor by a will, was called the *testamentary heir*; and the next of kin by blood, was, in cases of intestacy, called the heir at law or the *heir by intestacy*. The executor of the common law is, in many respects, not dissimilar to the testamentary heir of the civil law. Again, the administrator in many respects corresponds with the heir by intestacy. By the common law, executors, unless expressly authorized by the will, and administrators, have no right except to the personal estate of the deceased; whereas the heir of the civil law was authorized to administer both the personal and real estate.(a)

#### SECTION 2.—OF CONSANGUINITY AND AFFINITY.

1959. On the death of the ancestor, land descends to his kindred; we must therefore commence by ascertaining who are the kindred.

*Consanguinity* or *kindred* is the relationship of individuals by blood; the same as parentage. The word *parentage* is derived from the word *parere*, *pario*, to beget, to produce; *parens*, he who begets. Thus in its origin, the word *parent* signified the father and

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(a) 1 Browne's Civ. Law, 344; Story, Conf. of Laws, § 508.

mother, and other ascendants; it is the correlative of children, *parentes et liberi*. By the technical phrase *next of kin*, is understood the relations of a party who has died intestate, who take his estate under the statutes of distribution.

1960. The ancient Romans had words to designate each of the ascendants and descendants to the sixth degree, after which they called all the ascendants by the generic word *majores*, which we denominate as *ancestors*, a word derived from *antecessores*: they called all the descendants below the sixth degree *posteriores*, which we have rendered into *posterity*.

*Kindred* or *parentage* consists in being descended from the same author, from a common stock or root, whence spring all the branches of kindred, all the individuals who are united by the ties of blood or of parentage, which has been defined *vinculum personarum ab eodem stipite descenditum*.

1961. Nature has divided the kindred of every one into three principal classes: 1, his children and their descendants; 2, his father and mother and other ascendants; 3, his collateral relations, which include, in the first place, his brothers and sisters and their descendants; and, secondly, his uncles, cousins, and other relations of either sex, who have not descended from a brother or sister of the deceased.

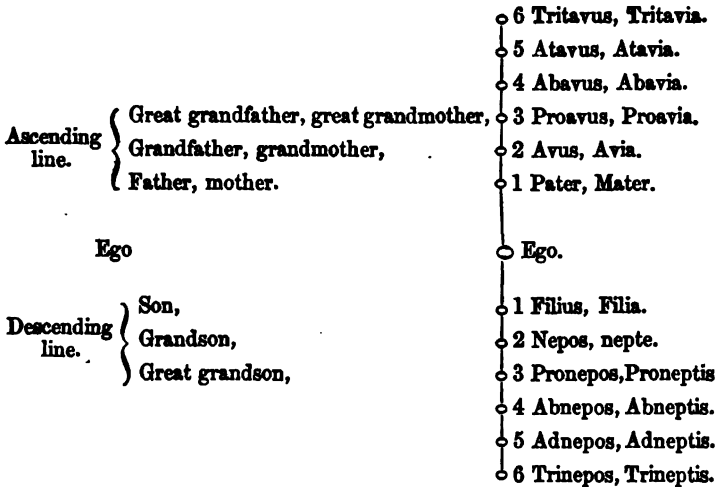
Husband and wife are not therefore next of kin, or kindred of each other.

Ascendants and descendants are *lineal* kindred; other relations fall into the *collateral* line. These two lines will be treated of under two heads, and the subject of affinity will occupy us in the third.

#### § 1.—Of direct lineal kindred.

1962. *Line* is the series of persons who have descended from a common ancestor, placed one under the other, in the order of their birth. It connects

successively all the relations by blood to each other. The following paradigm, in which the different terms which were given by the Romans to the six degrees of ascendants and descendants are mentioned, will make this manifest:



This *line* points out the generation, that is to say that the inferior person is the issue of the superior. Each *generation* lengthens the line and adds one degree to it; these degrees are nothing but the number of generations pointed out by small perpendicular lines which unite the little circles, representing the persons born. The word *degree* is a metaphorical expression borrowed from the steps of a ladder or of stairs; the kindred descending from their common ancestor, from generation to generation, are as so many steps in a stairs, or so many rounds in a ladder.

The degree of kindred is established by the number of generations.

In the direct line, of which we now speak, any one of the persons there represented may be taken as a

*propositus*, in order to class the other persons in the line, both above and below. This line is then severed into two, namely, the ascending line and the descending line.

Although there is but one *ascending* and one *descending* line, which we have seen forms but one, namely, the *direct* line, ascending from children to the fathers, and descending from the fathers to the children, each of these two sorts of ascendants and descendants has, under another point of view, several other lines, which must be distinguished.

When it is only necessary to count the degrees of father and son between an ascendant and a descendant, it is sufficient to consider only one line of paternal ascendants and descendants. But when we wish to distinguish the paternal and maternal descendants of the same person, and the descendants of his sons and daughters, we must then have several lines.

In pursuing all the ascendants of a person, we find a line which ascends to his father, his grandfather, his great grandfather, and so on from father to father; this is called the *paternal line*.

Another line, which ascends from the same person to his mother, to his grandmother, and so from mother to mother; this is called the *maternal line*.

The *number* of ascendants doubles at each degree. Each person has two ascendants at the first degree, four at the second, eight at the third. Thus in pursuing up the line of ascendants of each person, we go by diverse lines which fork at each generation. By this progress we find sixteen ascendants at the fourth degree, thirty-two at the fifth, sixty-four at the sixth, one hundred and twenty-eight at the seventh, and so on; at the twenty-fifth generation, this arithmetical progression makes the number of ascendants of an individual thirty-three millions five hundred and fifty-four thousand one hundred and thirty-two.

But as many of the ascendants of a person are

descended from the same ancestors, the lines which were forked are again joined to the first common ancestors, whence the others descend; and this multiplication, frequently interrupted by the common ascendants, may cease or be reduced to a few persons.

There is this difference between the ascending and descending lines, that in the *former* they are always the same, every man having a father and mother, two grandfathers and two grandmothers, and so on; although the number of ascendants may become unequal for the reasons just mentioned.

With regard to the *descending* lines, they fork differently, according to the number of descendants; they last a greater or a shorter time as the generations cease or continue. Many families become extinguished for want of descendants, others will last to the end of time. Thus the lines of descendants are diversified in different families.

#### § 2.—Of collateral kindred.

1963. *Collateral* consanguinity or kindred is the relationship existing among persons who descend from the same common ancestor, but not from each other.

Two persons may descend from the same father and mother, from the same grandfather and the same grandmother, and thus, in ascending the line to the great grandfather and great grandmother, and other ancestors. Then the tie of blood or kindred which unites them is double; that is, there is a double tie, that on the side of the father and that on the side of the mother. In this case the parties are of the *whole blood*.(a)

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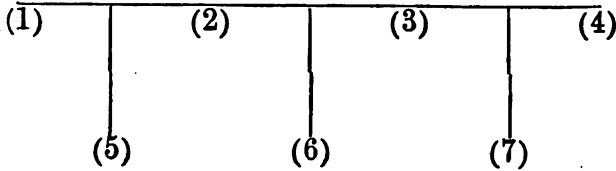
(a) Among the civilians, sons who are the issue of the same father and the same mother are called *brothers-german*. The word *german*, *germanus*, signifying in matters of descent, whole or entire, and it is applied not only to brothers, or sisters, but to cousins; hence the expression *cousins-german*.

But it is possible that these persons may be descended from the same father, grandfather, etc., but from different mothers or grandmothers; or, on the contrary from the same mother or grandmother, but from different fathers or grandfathers, as it happens when a man or a woman contracts successively two or more marriages, and that children are born from each; then relationship or kindred exists among the children only on one side, either on the side of the father or of the mother. The kindred between the parties is that of *half blood*. For example, if Primus marry Prima, and has by her two sons, they are of the whole blood; but if, after Prima's death, Primus marry Secunda and has by her a son, the sons of the first marriage and that by the second are of the half blood.

1964. By the civil law, persons born of the same father, grandfather, etc., but of different mothers, are called *consanguineous* children. Those born of the same mother, or grandmother, etc., but of different fathers, are called *uterine* children. In the common law there is no such distinction in the names, they are children of the half blood.

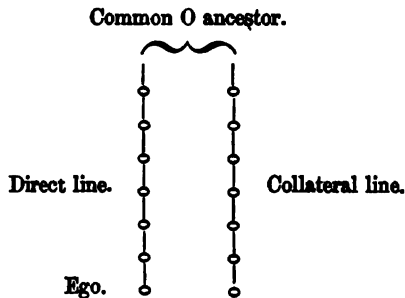
Sometimes it happens, in these two cases, that the brother of my brother is not of kin to me. For example, I have a consanguineous brother, that is, one born of the same father with myself, but of another mother. This brother has himself a uterine brother, the issue of his mother, but by another than our common father; this brother of my brother is not of kin to me.

This will appear clear by the following paradigm: There (1), represents my mother; (2), my father; (3), my father's second wife; (4), the second husband of my father's second wife; (5), myself; (6), my consanguineous brother; (7), my consanguineous brother's uterine brother.



1965. The collateral line, considered of itself, and relatively to the common ancestor, is a direct line ; it takes the name of collateral, when it is placed along side of another line below the common ancestor, in whom both lines unite.

The following is an example :



These two lines are independent of each other; they have no connection except by uniting in the person of the common ancestor; and it is this union which forms the kindred between the persons in these two lines.(a)

1966. There are two modes of computing degrees of collateral consanguinity, the one by the canon law, which has been adopted by the English common law, and the other by the civil law.

1. The mode of computation by the canon and English common law, is to discover the common ancestor, to begin with him and to reckon downward, and the degree the two persons or the more remote of them

(a) See ante, n. 249.



is distant from the ancestor, is the degree of kindred subsisting between them. For instance, two brothers are related to each other in the first degree, because from the father to each of them is one degree. An uncle and a nephew are related to each other in the second degree, because the nephew is two degrees distant from the common ancestor, and this rule of computation is extended to the remotest degree of collateral relationship.

2. The method of computing by the civil law, is to begin at either of the persons in question, and count up to and including the common ancestor, and then downward to the other person, calling it a degree for each person, both ascending and descending, and the number of degrees they stand from each other, is the degree in which they stand related. Thus from the nephew to his father is one degree, to the grandfather two degrees, and then to the uncle three, which points out the relationship. In computing the degrees of consanguinity, the civil law is generally followed in this country, except in North Carolina, where the rules of the canon or common law of England, in relation to descents, are adopted, to ascertain the degrees of consanguinity. (a)

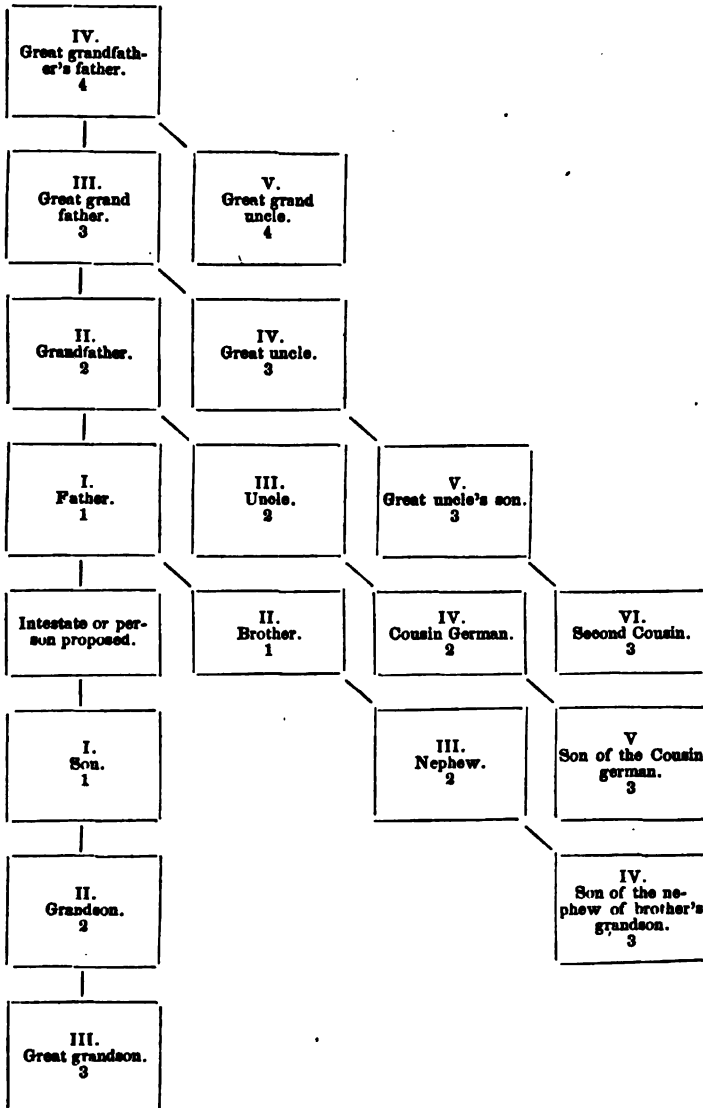
The mode adopted by the civil law is preferable, for it points out the actual degree of kindred in all cases; by the mode adopted by the common law, different relations may stand in the same degree. The uncle and nephew stand related in the same degree by the common law, and so are two first cousins or two sons of two brothers; but by the civil law the uncle and nephew are in the third degree, and the cousins are in the fourth. The mode of computation, however, is immaterial, for both will establish the same person to be the heir.

1967. The following table, in which the Roman

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(a) 4 Kent, Com. 412, 4th ed.; 2 Hilliard's Ab. 216.

numeral letters express the degrees by the civil law, and those in Arabic figures at the bottom, those by the common law, will fully illustrate the subject.



1968. Tables are frequently formed for the purpose of showing the history of a house or family, and how the persons therein named are connected together; this science is called *genealogy*, a word derived from two Greek words signifying *race* or *line*, and *treatise* or *discourse*. Genealogy is founded on the idea of lineage or family.

For illustrating descents and relationship, *genealogical tables* are constructed, the order of which depends on the end in view. In tables, the object of which is to show all the individuals embraced in a family, it is usual to begin with the oldest progenitor, and to put all the persons of both sexes in descending, and then in collateral lines. Others exhibit the ancestors of a particular person, in ascending lines both of the father and mother's side. In this way 2, 4, 8, 16, 32, etc., ancestors are exhibited, doubling, as has already been observed, at every degree.

Some tables are constructed in the form of a *tree*, after the model of the canonical law (*arbor consanguinitatis*,) in which the progenitor is placed beneath, as if for the root or stem. The persons descended from him are represented by the branches, one for each descendant. For example: if it be desired to form the genealogical tree of Peter's family, Peter will be made the trunk of the tree; if he has had two children, John and James, their names will be written on the first two branches; which will themselves shoot out as many twigs as John and James have children; these will produce others, till the whole family shall be represented on the tree.

The word *branch*, which is used to designate a portion of a family, it will be perceived is a metaphorical expression, which designates in the genealogy of a numerous family, a portion of that family which has sprung from the same stock or root; these latter expressions, *stock* and *root*, like *branch*, are used in a figurative sense. Thus the origin, the application and

the use of the word branch in genealogy will at once be perceived.

§ 3.—Of affinity.

1969. *Affinity* is a connection formed by marriage, which places the husband in the same degree of nominal propinquity to the relations of the wife, as that in which she herself stands toward them, and gives to the wife the same reciprocal connections with the relations of the husband. The term is used in contradistinction to consanguinity, for affinity is no real kindred.

Affinity, or, as it is sometimes called, *alliance*, is very different from kindred. Kindred are relations by blood; affinity is the tie which exists between one of the spouses and the kindred of the other; thus the relations of my wife, her brothers, her sisters, her uncles, are allied to me by affinity; and my brothers, sisters, etc., are allied in the same way to my wife. But my brother and the sister of my wife are not allied by the ties of affinity.<sup>(a)</sup>

The degrees of affinity are computed in the same way as those of consanguinity.

SECTION 3.—OF THE ESTATE WHICH DESCENDS.

1970. All *freehold estate in lands of inheritance descend to the heir*. Land owned in fee by the ancestor, together with all the buildings; permanent fixtures; things which though personal in their nature, or movable, are constructively attached to the real estate, as the keys of a house, title deeds and the box in which they are kept, and heir-looms; all mines and minerals; trees, bushes, and fruits hanging by the roots; straw and manure, when raised on the land, unless under

<sup>(a)</sup> This has been fully explained, ante, n. 251, vol. 1, p. 107.

some special circumstances, when they are considered as personal property; fish in a pond; and wild animals, when in a helpless state, as whelps,<sup>(a)</sup> descend to the heir. All emblements are also considered part of the real estate and descend to the heir.

A life estate, not being of inheritance, does not descend, because, on the death of the tenant for life, the estate is determined.

Terms of years, and other estates less than freehold, pass to the executor or administrator, and are not subjects of descent.

Personal property, whether in possession or in action, does not descend to the heir, but goes to the personal representatives of the deceased.

#### SECTION 4.—OF THE RULES OF THE LAW OF DESCENT.

1971. In the English law these rules are established and well understood; they are generally calculated to protect the aristocracy, and to keep landed estates in families, to the prejudice of the younger branches. With a more extended equity the laws in this country, though varying very much in their details in the different states, yet in general, wisely unite in distributing the real estate of which the ancestor dies seised, among his kindred who stand to him in the same degree of relationship.

It is not easy to lay down even general rules of inheritance. When it is considered that each state has a code of its own, regulating descents, which must necessarily, in many matters of detail, differ very essentially from all the others, the difficulty of the task will be easily perceived. The only safe mode of studying this subject is to consider, with care, the statute laws of descent of the particular state, respect-

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(a) See ante, Second Division of Property, part 1, tit. 2, c. 1.

ing which information is sought, and the decisions of the courts of that state on the subject.

The law does not cast the descent on all the kindred alike. Following nature, it divides the kindred of every one, as before observed, into three classes :

1. His children and their descendants.

2. His father and mother and other ascendants.

3. His collateral kindred, among whom are included, first, his brothers and sisters and their descendants ; second, his uncles, cousins and other kindred of both sexes, who are not the issue of a brother or sister. Nature herself, then, has established the order of descent in three lines, the descending, the ascending and the collateral.

The preference given to one of these lines over the others does not depend on the proximity of the degree of each line, compared with the degree of kindred of the other line.

Two things are to be observed : 1, that the preference given to a class or line, is independent of the proximity of the degree of either of the others ; 2, the right or extent of the right of the kindred of each line among themselves.

§ 1.—Rules in relation to the descending line.

1972.—1. The law, following the order of nature, casts the descent, in the first place, on the children and other *descendants* of the ancestor ; in other words, on his posterity. They are preferred to the exclusion of another class or order, of ascendants or collaterals, even should the ascending or collateral kindred be connected to the ancestor in a nearer degree of relationship ; for example, a great grandson will be preferred to the father.

1973.—2. But when the rights of descendants are to be ascertained, the question then is determined by finding out who is in the *nearest degree of kindred*: all

descendants are then excluded, who are further from the ancestor than the one in the nearest degree, unless they can claim by way of representation. By *representation* is meant the right which a child has to take the share of an estate which would have descended to him through his father or mother if he had lived until the descent was cast by the death of the ancestor.

1974.—3. It is only when there is no posterity of the ancestor, that the ascending or collateral line can inherit.

1975.—4. It is a general rule of the law of inheritance, that if a person owning real estate dies seised, or as owner, without devising the same, the estate will descend to his posterity in the direct line, and, if there be but one person, then to him or her alone; and if more than one person, and all of equal degree of consanguinity to the ancestor, then the inheritance shall descend to the several persons as tenants in common, in equal parts, however remote from the intestate the common degree of consanguinity may be. This rule is in favor of the equal claims of the descending line, in the same degree without distinction of sex, and to the exclusion of all other claimants. In this case, the heirs are said to take *per capita*, or by the head, each claiming in his own right, and not by way of representation or of transmission.

The following example will illustrate the rule; it consists of three distinct cases:

1. Suppose Paul die seised of real estate, leaving two sons and a daughter; in this case the estate descends to them in equal parts. But suppose,

2. That instead of children he should leave several grandchildren, two of them the children of his son Peter, and one the son of his son John; these will inherit the estate in equal proportion. Or,

3. Instead of children and grandchildren, suppose

Paul left ten great grandchildren, one the descendant of his son John, and nine the descendants of his son Peter; these, like the others, would partake of the inheritance equally as tenants in common.

According to Chancellor Kent, this rule prevails in all the United States, with this variation, that in Virginia the male descendants take double the share of the females; and in South Carolina, the widow takes one-third of the estate in fee, and in Georgia she takes one child's share in fee, if there be any children, and, if none, she then takes in each of those states a moiety of the estate. In North and South Carolina, the claimants take in all cases *per stirpes*, or by way of representation, though standing in the same degree. (a) In Louisiana the rule is, that in all cases when representation is admitted, the partition is made by roots; if one root has produced several branches, the subdivision is to be made by root in each branch, and the members of the branch take among themselves by head, or *per capita*. (b)

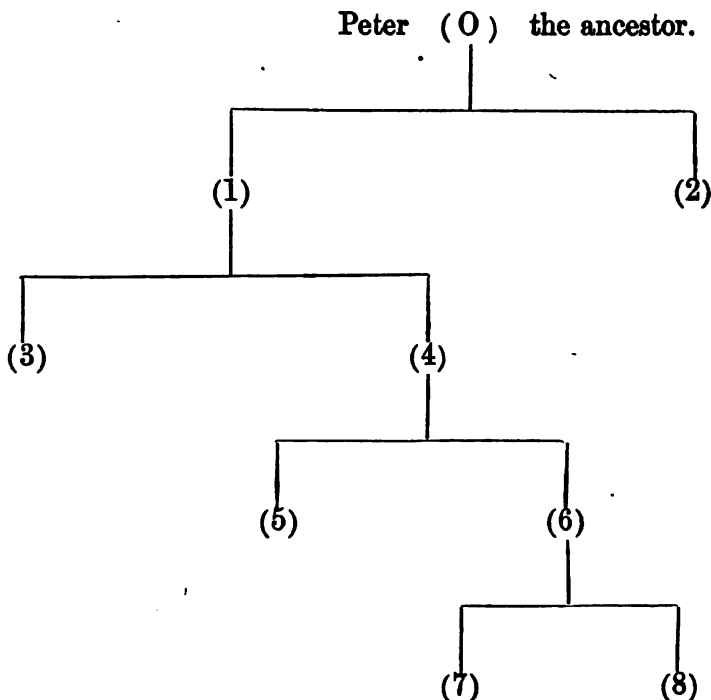
1976.—5. When a person dies intestate, seised of lands of inheritance, and he leaves lawful issue, in different degrees of consanguinity, the estate shall descend to the children and grandchildren of the ancestor, if any be living, and to the issue of such children and grandchildren as shall be dead, and so on to the remotest degree as tenants in common; but such grandchildren and their descendants shall inherit only such shares as their parents respectively would have inherited, if living. This rule may be illustrated by the following example: Suppose Peter, the ancestor, had two children, John dead, represented in the following diagram by (figure 1); and Maria, living, (fig. 2); John had two children, Joseph living, (fig. 3),

(a) 4 Kent, Com. 391, 4th ed.; Reeves' Law of Descents, *passim*; Grif. Law Reg. answer to 6th interrogatory under the head of each state.

(b) Civil Code of Lo. art. 895.



and Charles, dead, (fig. 4); Charles had two children, Robert, living, (fig. 5), and James dead, (fig. 6); James had two children, both living, Ann, (fig. 7), and William, (fig. 8).



In this case, Maria would inherit one half; Joseph, the son of John, one half of the half, or a quarter of the whole; Robert one eighth of the whole; William and Ann, each one sixteenth of the whole, which they would hold as tenants in common in these proportions. This is called inheritance *per stirpes*, by roots, or representation, because the heirs who represent others, take in such portions only as their immediate ancestors would have inherited if living.

## § 2.—Rules in relation to the ascending line.

1977.—1. When the descending line is completely exhausted, the ascending line becomes generally entitled to the inheritance. When the owner of land dies intestate, and without lawful issue, leaving parents, it is the rule in some of the states, that the inheritance shall *ascend* to them, first to the father and then to the mother, or jointly to both, under certain regulations established by the particular statutes. It is laid down by a learned writer,<sup>(a)</sup> as a general rule in the American law of descent, that when the intestate has left no lineal descendants, nor parents, nor brothers, nor sisters, nor their descendants, that the grandfather takes the estate before the uncles and aunts, as being nearest of kin to the intestate.

1978.—2. It is nearly a general rule that the ascending line, after parents, is postponed to the collateral line of brothers and sisters. In Louisiana, the ascending line must be exhausted before the estate passes to collaterals.<sup>(b)</sup>

## § 3.—Rules in relation to the collateral line.

1979.—1. When the intestate dies without issue or parents, or other ancestors, the estate descends to his brothers and sisters, and their representatives.

1980.—2. When there are such relations, and all of equal degree of consanguinity to the intestate; the inheritance descends to them in equal parts, however remote from the intestate the common degree of consanguinity may be; as where they are all brothers and sisters, or all nephews and nieces.

1981.—3. When some are living and others are dead, who stood in the same degree, and who have

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(a) 4 Kent, Com. 407, 4th ed.

(b) Code, art. 910.

left issue, the living shall take in their own right, and the descendants of the deceased shall take by representation the respective shares of the deceased, and each set divide such share *per capita*.

1982.—4. Considerable difference exists in the laws of the several states, when the next of kin are nephews and nieces, and uncles and aunts, who claim as standing in the same degree. In many of the states all these relations take equally as being next of kin; this is the rule in the states of New Hampshire, Vermont, (subject to the claim of males to a double portion,) Rhode Island, North Carolina, and Louisiana. In Alabama, Connecticut, Delaware, Kentucky, Georgia, Illinois, Maine, Maryland, Massachusetts, Mississippi, Missouri, New Jersey, New York, Ohio, Pennsylvania, South Carolina, Tennessee and Virginia, on the contrary, nephews and nieces take in exclusion of uncles and aunts, though they be of equal degree of consanguinity to the intestate.

1983.—5. When the intestate dies leaving no lineal descendants, nor parents, nor brothers, nor sisters, nor any of their descendants, nor grand-parents, as a general rule, it is presumed, the inheritance descends to the brothers and sisters of the intestate's parents, and to their descendants equally. When they all stand in the same degree to the intestate, they take *per capita*, and when in unequal degree, *per stirpes*. To this general rule, however, there are slight variations in some of the states, as, in New York, grand-parents do not take before collaterals.

1984.—6. When the inheritance comes from the father, then the brothers or sisters of the father and their descendants shall have the preference, and in default of them, the estate shall descend to the brothers and sisters of the mother, and their descendants; and when the inheritance comes to the intestate on the part of the mother, then her brothers and sisters and their descendants have the preference, and,

in default of these, the brothers and sisters on the side of the father, and their descendants, inherit. This is a rule in a number of the states, though in some others there is, perhaps, no distinction, as to the descent, whether the estate has been acquired by purchase or by descent from an ancestor.

1985.—7. By the English common law, one related to an intestate of the half blood only, could never inherit, upon the presumption that he is not of the blood of the original purchaser; in this country the common law principle on this subject may be considered as not being in force, though in some states some distinction is still preserved between the whole and the half blood.

1986.—8. When there is a failure of heirs under the preceding rules, the inheritance descends to the remaining next of kin of the intestate, according to the rules of the statute of distribution of the personal estate, subject to the doctrine in the preceding rules in the different states as to the half blood, to ancestral estates, and as to equality of distribution. This rule prevails in several states, subject to some peculiarities, in the local laws of descent, which extend to it.

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## CHAPTER II.—OF ESCHEATS.

1987. By *escheat* is understood by the English law an obstruction to the course of descent, and a consequent determination of the tenure, by some unforeseen contingency, in which the land naturally results back, by a kind of reversion, to the original grantor, or lord of the fee.(a)

All escheats under the English law, are declared to be strictly feudal, and to import the extinction of

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(a) 2 Bl. Com. 244.

tenure.(a) But, as feudal tenures do not exist in this country, no private person can succeed to the inheritance by escheat. By virtue of its sovereignty, the state steps in, in place of the feudal lord, as original and ultimate proprietor of all lands which have no other lawful proprietor within its jurisdiction. It seems to be the universal rule of civilized states, that when the deceased owner has left no heirs competent to take it, that it should vest in the public, and be at the disposal of the government.(b)

#### CHAPTER III.—OF FORFEITURE.

1988. Forfeiture, which has already been defined,(c) may take place in relation to lands and tenements by various means: 1, by the commission of crimes and misdemeanors; 2, by alienation contrary to law; 3, by the non-performance of conditions; 4, by waste.

##### SECTION 1.—OF FORFEITURE FOR CRIMES.

1989. By the constitution of the United States,(d) it is declared that no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted. And by a statute of the national legislature, it is enacted that no conviction or judgment for the offences mentioned in the act, shall work corruption of blood, or forfeiture of estate.(e) As the offences punished by this act are of the blackest dye, including cases of treason, the punishment of

(a) Wright on Ten. 115—117; 1 W. Bl. Rep. 123.

(b) Code, 10, 10, 1; Domat. Dr. Publ. liv. 1, t. 6, s. 3, n. 1. See 3 Dane, Ab. 140, s. 24; 1 Bro. Civ. L. 250; 10 Vin. Ab. 139.

(c) Ante, n. 1558.

(d) Art. 3, s. 3.

(e) Act of April 30, 1790.

forfeiture for crimes may be considered as abolished by the general government.

The punishment of forfeiture for crimes is very much reduced, if it exist, under the state laws; and should it occur, the state takes the title the party had, and no more.

## SECTION 2.—OF FORFEITURE BY ALIENATION.

1990. By the English law, estates less than a fee, may be forfeited to the party entitled to the residuary interest by a breach of duty in the owner of the particular estate. When a tenant for life or years, therefore, by feoffment, fine, or recovery, conveys a greater estate than he is by law entitled to do, he forfeits his estate to the person next entitled in remainder or reversion.(a)

In this country such forfeitures are almost unknown, and the more just principle prevails, that the conveyance by the tenant operates only on the interest he possessed, and does not affect the remainder man or reversioner.(b)

## SECTION 3.—OF FORFEITURE BY NON-PERFORMANCE OF CONDITIONS.

1991. An estate may be forfeited by a breach or non-performance of a condition annexed to the estate, either expressed in the deed in its original creation, or implied by law, from a principle of natural reason.(c) The subject of breach and non-performance of conditions having been sufficiently considered in another place,(d) it is unnecessary to investigate the subject any further here.

(a) 2 Bl. Com. 274. See *Stump v. Findley*, 2 Rawle, 168.

(b) 4 Kent, Com. 81, 82; 1 Hill. Ab. c. 4, s. 25 to 34; 3 Dall. 486; 5 Ohio, 30. But see *French v. Rollins*, 8 Shep. 372.

(c) 2 Bl. Com. 281; *O'Brien v. Doe*, 6 Ala. 787.

(d) Ante, book 2, part 2, tit. 4, c. 4.

## SECTION 4.—OF FORFEITURE FOR WASTE.

1992. *Waste* is a spoil or destruction in houses, gardens, trees, or other corporeal hereditaments, to the disherison of him who has the remainder or reversion in fee simple or fee tail.(a) Waste is voluntary or permissive.

In England, by the statute of Gloucester, tenants for life, for years, in dower, or by the curtesy, are punishable for waste, by a forfeiture of the thing or place wasted, and treble damages.

The provisions of this statute may be considered as generally in force in the United States, so far as it is applicable to our institutions. In some of the states some of its provisions have been reenacted, in others the statute is not in force, and its principles have not been adopted by the courts.(b)

## CHAPTER IV.—OF MERGER.

1993. *Merger* is the annihilation of one estate in another; it takes place when a greater estate and a less coincide and meet in one and the same person, without any intermediate estate; the less is immediately merged, that is, sunk or drowned in the latter; example, if there be a tenant for years, and the reversion, in fee simple, descends to, or is purchased by him, the term of years is merged in the inheritance, and no longer exists; but they must be in one and the same person, at one and the same time, in one and the same right.(c)

(a) 2 Bl. Com. 281; Co. Litt. 53.

(b) 1 Hilly. Ab. §§ 34—48.

(c) 2 Bl. Com. 177; Phillips v. Bardell, 2 Binn. 142; S. C. 3 Yeates, 128. A mortgage does not necessarily merge in consequence of an assignment of it being made to the owner of the mortgaged premises, if the intention of the parties was otherwise. Moore v. Harrisburg Bank, 8 Watts, 138.

1994. Although there is some resemblance between a merger and a surrender, yet they are easily distinguishable in many cases. A surrender is one of the many modes by which a merger may be effected, but it is not the only one. It must be made by the tenant of the particular estate, and he must relinquish his right to the reversioner or remainder man. A merger is confined to cases in which the tenant of the estate in reversion or remainder grants that estate to the tenant of the particular estate, or in which the particular tenant grants his estate to the reversioner or remainder man.<sup>(a)</sup> Surrender is the act of the party; merger, the act of the law.

Merger bears also some resemblance to suspension and extinguishment. The difference between them is pointed out with much clearness in the following extract: "Merger is the annihilation of one estate in another. *Suspension* is a partial extinguishment, or extinguishment for a time. *Extinguishment* is the annihilation of a collateral thing or subject, in the subject itself out of which it is derived. A rent, a common, a seignior, may be extinguished. That the estate in the rent, common or seignior ceases, is the consequence of the extinguishment of the subject itself. When the subject ceases, the estate therein must also cease. Under the doctrine of merger the subject may continue after the annihilation of one estate in another; for notwithstanding the annihilation of the estate, the subject continues, and the effect of the merger is only to involve the time of one estate in the time of another estate, or, at the utmost, to accelerate the right of possession under the more remote estate. Thus suspension and extinguishment, correctly taken, are applicable rather to the things themselves, than to the estates or degrees of interest therein. Again, suspension is merely for a time, because the party, whose interest

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(a) 3 Prest. on Conv. 23, 153.



is to be suspended, has a particular estate ; or because he has a defeasible interest, so that the subject itself, or the estate therein may revive, when there shall be a separation of these interests, which, if they were absolutely united, would be extinguished.”(a)

1995. In order to create a merger there must be *two estates*, distinct from each other, in the same person ; therefore when there is but one estate the merger does not take place. For example, a lease made to A and his assigns, for the lives of himself and two others, is considered but one freehold. But where the estate is not joint but successive, then the estates being distinct, a merger may take place.(b)

Where an estate and a mere right in the land, not an estate, meet in *the same person*, the merger will not take place, because such an interest is not an estate.(c) The merger must be produced either from the meeting of an estate of higher degree with an estate of inferior degree, or from the meeting of the particular estate and the immediate reversion or remainder in the same person ; for when there is an intermediate estate, that will prevent the merger. As soon as the intermediate estate determines, however, this removes the impediment to the merger.(d)

To create a merger, the estates must meet in the *same party* and at *the same time*, and in *the same right*. For if they are held by the party at different times, the right and duty do not meet ; and if they be held in different rights, as where the life estate is held by A in his own right, and an estate for years is held by him as executor, there can be no merger.

The estate in which the merger takes place, is not enlarged by the accession of the smaller estate ; and

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(a) 3 Prest. on Conv. 9, 10, 11.

(b) *Roose's case*, 5 Co. 13 ; S. C. nom. *Ross v. Aldwick*, Cro. Eliz. 191 ; S. C. Gouldsb. 187 ; 15 Vin. Ab. 366.

(c) *Pawling v. Hardy*, Skin. 2, 62.

(d) *Bate's case*, 1 Salk, 254.

the greater, or only subsisting estate, continues, after the merger, precisely of the quality and extent of ownership, as it was before the accession of the estate which is merged, and the lesser estate is extinguished.<sup>(a)</sup>

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*Division 2.—Of titles acquired by the acts of the parties.*

CHAPTER I.—OF ALIENATION BY DEED.

1996. *Alienation* is the act by which the title to an estate is voluntarily resigned by one person and accepted by another, in the form prescribed by law.<sup>(b)</sup> This chapter will be divided into six sections: 1, what estates may be alienated; 2, by whom the alienation may be made; 3, to whom the alienation may be made; 4, by what instrument; 5, of the several kinds of deeds at common law; 6, of conveyances under the statute of uses.

SECTION 1.—WHAT ESTATE MAY BE ALIENATED.

1997. In general all the real estate which a man owns, and of which he is seised, may be alienated; and there is no restriction to its transfer and conveyance. A fee simple, a life estate, a term of years may be transferred by deed; and an incorporeal hereditament, which lies in grant, may be alienated by a deed.

By the English law there is one check to this power of alienation by the statute of 32 Hen. VIII., c. 9, which forbids the sale of pretended titles; that is, the sale of land of which another is in possession, holding adversely to the claim. Every grant of land, there,

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<sup>(a)</sup> 3 Prest. on Conv. 7.

<sup>(b)</sup> Co. Litt. 118 b; Cruise, tit. 32, c. 1, s. 1.

except as a release, is void as an act of maintenance, if at the time the lands are in the possession of another person, claiming under a title adverse to that of the grantor.(a) This statute imposed a forfeiture upon the seller, of the whole value of the lands sold, and the same penalty upon the buyer also, if he purchased knowingly.

Although the provisions of this statute, which appears to have been enacted to prevent rich and powerful men from oppressing the weak,(b) seem to have no application in this country, where none are above the law, and none below its protection, yet its provisions, somewhat modified, prevail in Connecticut, Massachusetts, Vermont, Maryland, New York, North Carolina, Indiana, Kentucky, Tennessee, and probably in some other states. In Illinois, Louisiana, Missouri, New Hampshire and Pennsylvania, a conveyance by a disseisee passes to the purchaser the title which he has at the time of the conveyance.(c)

SECTION 2.—BY WHOM THE ALIENATION MAY BE MADE.

1998. A tenant in fee simple has an unrestrained power of alienation, and any attempt to limit this power would be void.(d) A tenant for life may alienate the whole or a part of his estate, unless restrained by some condition,(e) and so may a tenant for years. A corporation authorized to hold real estate, may alienate it in fee, or for life or years.

But in order to convey the title, the grantor or alienor must be *sui juris*, or capable to perform such an act by authority of a statute. An infant or a person *non compos mentis*, cannot of course make a

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(a) Litt. § 347.

(b) Co. Litt. 214 a.

(c) 4 Kent, Com. 448, 449.

(d) Litt. § 360.

(e) Wittingham's case, 8 Co. 44.

lawful conveyance. But married women are generally authorized, in this country, to make a conveyance of their lands and to divest themselves of all right, by pursuing the directions of the statutes of the state where the lands lie, and acknowledging the deed before such judges or other magistrates as those laws require.(a)

SECTION 3.—TO WHOM THE ALIENATION MAY BE MADE.

1999. Every citizen of the United States is capable of holding lands by purchase, provided he be able to make a contract, and all such citizens may take by descent or devise.

By the English law an alien could not hold lands, and this policy which is perhaps not the best even in England, has been adopted in some of the states of the Union. But in others the law has been either totally changed or greatly modified; in some, as in Pennsylvania, an alien may hold a certain quantity of land, after he has declared his intention to become a citizen of the United States. In some states it requires that the alien should be a resident for a definite period of time.(b)

SECTION 4.—BY WHAT INSTRUMENT.

2000. *Conveyance* is the transfer of the title of land by one or more persons to another or others. By persons here is meant not only natural persons, but corporations. The instrument which conveys the property is also called a conveyance.

2001. The term *assurance*, or common assurance, is more extensive in its signification. In an enlarged

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(a) See Bouv. L. D. Acknowledgment.

(b) *Trustees v. Gray*, 1 Litt. 149. See *Orr v. Hodgson*, 4 Wheat. 453; *Jackson v. Beach*, 1 John. Cas. 399; *Dudley v. Grayson*, 6 Monr. 260; *Marshall v. Conrad*, 5 Call. 364.

sense, it includes all instruments which dispose of property, whether they be the grants of private persons or not; such as fines and recoveries and private acts of the legislature.(a)

2002. Lands may be alienated by deed, by matter of record, and by devise. We will, under this section, consider alienations by deed.

In speaking of the form of contracts, we had occasion to define a deed to be an instrument under seal, written or printed, containing some contract or agreement, and which has been delivered by the parties.(b) And in a more confined sense a deed is an instrument executed by the parties, for the conveyance of land.

This section will be divided into three heads: 1, relating to the form of deeds; 2, their general requisites; 3, their several parts.

§ 1.—Of the form of deeds of conveyance.

*Art. 1.—Of an indenture.*

2003. An *indenture* is an instrument, written or printed, containing a conveyance or contract, between two or more persons, usually indented or cut unevenly, or in and out, on the top or side.

Formerly it was common to make two instruments exactly alike, and it was then usual to write both on one skin of parchment, to be afterward separated; on the line where they were to be cut the letters of the alphabet or some particular words were written in a large hand, and the two deeds were separated by cutting across those letters in an indented manner, *instar dentium*, so as to leave one half of the word on one part, and half on the other. Deeds thus made were denominated *syngrapha*, by the canonists, be-

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(a) *Eunom. Dial.* 2, s. 5.

(b) *Ante*, n. 874.

cause that word, instead of the letters of the alphabet, or the word *chirographum*, was used.

In time, it came to be the practice to indent deeds, although they were made only on one skin of parchment and there was no counterpart. At present the indenting is of no consequence. Besides it would be extremely difficult to cut a piece of parchment or paper, even with the sharpest instrument, so that no indentation could be perceived by the aid of the microscope.

This instrument usually commences with these words, "This Indenture." Formerly they were insufficient unless the instrument was actually and visibly indented. But now an instrument commencing with these words, is a deed indented, for every legal purpose.(a)

*Art. 2.—Of deeds poll.*

2004. A *deed poll* is an instrument, written or printed, on parchment or paper, executed under the hand and seal of the party, by which one person conveys or grants some estate or right to some other; it is shaved or polled at the top. It is for this reason called a deed poll or single deed.(b)

Strictly speaking, a deed poll is not an agreement between two persons, but a declaration by one particular person respecting an agreement made by him with some other person; for example, a feoffment from A to B, by deed poll, is not an agreement between A and B, but is rather a declaration by A, addressed to all mankind, informing them that he thereby gives and enfeoffs B of certain lands therein described.(c) In form it is as follows: "Know all men by these

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(a) *Currie v. Donald*, 2 Wash. 58.

(b) Co. Litt. 299, a.

(c) A deed poll is the deed of the party making it, and concludes him only. *Giles v. Pratt*, 2 Hill, 8. Car. R. 439.

presents, that I, A B, have given, granted and enfeoffed, and by these presents do give, grant and enfeoff," etc.

*Art. 3.—Of deeds original and counterparts, and of una parte and inter partes.*

2005.—1. When speaking of an instrument we say it is *original* when it is authentic, and is to serve as an example or model to be copied or imitated; the term is used in contradistinction to a copy. An original deed is one which is executed by the parties to it, to be evidence of their act. Originals are single or duplicate; single when there is but one, duplicate when there are two.(a)

2006.—2. Formerly each party to an indenture executed a separate deed; that part which was executed by the grantor was called the original, and the rest the *counterparts*.(b) It is now usual for all the parties to execute every part, and that makes them all originals.

2007.—3. Deeds *de una parte*, are those where only one party grants, gives, or binds himself to do a thing to another. A deed poll is an example of this kind. By that deed one of the parties grants every thing, and the other receives every thing. In one sense, it is true there can be no deed absolutely *de una parte*.(c)

2008.—4. The technical expression *inter partes* signifies an agreement professing in the outset, and before any stipulations are introduced, to be made between such and such persons; as, for example, "This Indenture made the — day of — 1851, between A B, of the one part, and C D, of the other part." It is true that every contract is in one sense *inter partes*, because to be valid there must be two parties

(a) See *Dudley v. Sumner*, 5 Mass. 438.

(b) Touchs. 55.

(c) Touchs. 50.

at least; but the technical sense of this expression is as above mentioned.(a)

This being a solemn declaration, the effect of such introduction is to make all the covenants, comprised in a deed, to be covenants between the parties and none others; so that should a stipulation be found in the body of a deed "between A B, of the one part, and C D, of the other part," by which "the said A B covenants with E F to pay him one hundred dollars," the words "with E F," are inoperative, unless they have been used to denote for whose benefit the stipulation may have been made, being in direct contradiction with what was previously declared, and C D alone can sue for the non-payment; it being a maxim that where two opposite and irreconcilable intentions are expressed in a contract, the first in order shall prevail.(b)

When there are more than two sides to a contract *inter partes*, for example, a deed; as where it is "made between A B, of the first part; C D, of the second part; and E F, of the third part," there is no objection to one covenanting with another, in exclusion of a third.(c)

§ 2.—Of the general requisites of deeds.

2009. These are, 1, that there be sufficient parties; 2, that the deed be in writing or printing, on paper or parchment; 3, that there be a consideration; 4, that sufficient words be used; 5, that it be read when required; 6, that it be signed and sealed; 7, that it be witnessed; 8, that it be delivered; 9, that it be recorded.

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(a) Addison on Contr. 9; Ham. on Part. 18.

(b) 8 Mod. 116; 1 Show. 58; 3 Lev. 138; 7 M. & W. 63; Hornbeck v. Westbrook, 9 John. 73. But this rule does not apply to simple contracts *inter partes*, 2 D. & R. 273.

(c) Addison on Contr. 267. See Scott v. Whipple, 5 Greenl. 336; Hornbeck v. Westbrook, 9 John. 73.



*Art. 1.—Of the parties to a deed.*

2010. The *parties* to a deed are those persons who grant, give, or convey some estate or thing, or agree to perform and do some act, and those to whom a grant, a gift or conveyance is made with their consent,<sup>(a)</sup> or who agree to receive the performance of something. In general, all persons can make or accept a deed, unless they labor under some legal disability, such as want of reason, infancy, or insanity; or want of will, as where a woman is under coverture, or where a person is under duress; or, in consequence of their situation, they are disqualified, as being trustees.

He who makes the deed is called the *grantor*, and the other party is denominated the *grantee*.

In general, the names and surnames of the parties ought to be used; but it is said that the law knows but one Christian name, and that therefore the omission of the middle name, or of the initial letter representing it, in a deed of conveyance, is immaterial.<sup>(b)</sup> It has, however, been holden that a deed made to certain persons, members of a firm, by the social name, as A, B & Co.; that those named, namely, A and B, can take, and they will be trustees for themselves and their other copartners.<sup>(c)</sup> And a deed to "P H & Son," it seems, was sufficient to enable the son to take under it, that being a sufficient description.<sup>(d)</sup>

When made by an attorney, the deed should be in the name of the principal; and the attorney must be appointed by deed.<sup>(e)</sup>

(a) *Mallory v. Stodder*, 6 Ala. 801.

(b) *Dunn v. Games*, 1 McLean, 321; *Bouv. Law Dict. Name*; *James Stiles*, 14 Pet. 322.

(c) *Beaman v. Whitney*, 7 Shep. 413.

(d) *Hoffman v. Porter*, 2 Brock. 156.

(e) *Harper v. Hampton*, 1 Har. & John. 622; *Plummer v. Russell*, 2 Bibb, 174; *Elwell v. Shaw*, 16 Mass. 42; *Barger v. Miller*, 4 Wash. C. C. 280; *Beales v. Gram*, 11 S. & R. 299; *Smith v. Dickinson*, 6 Humph. 261.

A deed by a corporation must be executed in the corporate name, by officers lawfully authorized, and under the corporate seal.(a)

*Art. 2.—The deed must be in writing on paper or parchment.*

2011. Though formerly lands were conveyed in England by a sale and *livery of seisin*, which was a ceremony used under the common law, they are transferred in this country generally by deed, which dispenses with this ceremony; recording has the same effect.(b) Livery of seisin was in *deed*, which was performed by the feoffor going upon the land and delivering possession of it to the purchaser; or in *law*, when the same was not done upon the land, but in sight of it.(c)

The statutes to prevent frauds and perjuries require that all contracts to grant estates and interests in lands, (except leases not exceeding three years,) shall be in writing.(d)

The agreement must be reduced to writing, under which is included printing, before the deed is delivered, for the delivery of a blank piece of paper, signed and sealed by the party, is not a deed.(e)

2012. To prevent frauds, from easy alterations, the writing must be on paper or parchment, for if it be written on wood, linen, the bark of a tree, a stone, or the like, and it be delivered as a deed, it will not have that operation.(f)

2013. It may be written in any known language,

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(a) *Hatch v. Barr*, 1 Ham. 390.

(b) In Maryland, however, it seems that a deed cannot operate as a feoffment without livery of seisin. *Matthews v. Ward*, 10 Gill & John. 443, contradicts this. 5 Harr. & John. 158.

(c) 2 Bl. Com. 315, 316.

(d) Ante, n. 910.

(e) *Duncan v. Hodges*, 4 McCord, 239; *Perminster v. McDaniel*, 1 Hill, So. Car. Rep. 267; *Toucha*. 54.

(f) *Toucha*. 54.

and in any hand writing, usually understood by persons versed in such hand writing.

*Art. 3.—Of the consideration.*

2014. As between the grantor and the grantee *no consideration need be proved*, the seal always imports one; and one is generally mentioned in the deed. The amount of the consideration is of little consequence between the parties where every thing is fair, and clear of fraud. One dollar is as good a consideration, in such cases, as a thousand dollars. It is when creditors are to be affected, that it becomes requisite to inquire into the justice of the consideration and the fairness of the transaction.

The English statutes of 13 Eliz. c. 5, and 27 Eliz. c. 4, already considered in this work, *(a)* render void any fraudulent gifts or conveyances. The first relates to creditors, and the last to purchasers of lands. These statutes have been reënacted, or their principles adopted, in nearly all the states of the Union, though with some modifications and alterations. *(b)*

In this country a *bona fide* purchaser for a valuable consideration is protected, whether he purchase from a fraudulent grantor or a fraudulent grantee; and there is no difference in this respect between a deed to defraud subsequent creditors, and one to defraud subsequent purchasers. *(c)*

The deed may be founded on a *good* or a *valuable* consideration, the nature of which has already been considered.

*(a)* Ante, n. 673.

*(b)* 3 John. Ch. 481; 8 Wheat. 229; Dane's Ab. index, h. t.; Hare & Wall. Amer. Lead. Cas. 33—69. The principles of these statutes of 13 & 27 Eliz. were borrowed from the civil or Roman law. Dig. 42, 8, 5, 11; 2 Bell's Com. 182, 5th ed.

*(c)* Price v. Jenkin, 4 Watts, 85; Thompson v. McLean, 1 Ashm. 129; *Somes v. Brower*, 2 Pick. 184; *Bean v. Smith*, 2 Mason, 252; *Anderson v. Roberts*, 18 John. 515; *Bridge v. Eggleston*, 14 Mass. 245.

*Art. 4.—Of the words to be used in a deed.*

2015. The words used must be set forth according to law; that is, there must be words sufficient to signify the terms and conditions of the contract. It is not indispensably requisite to have all the usual formal parts drawn out in deeds; nor will a palpable mistake of a word defeat a deed, when the intent of the parties is manifest.(a) This subject will be more fully considered when we come to treat of the several parts of a deed in the next section.

*Art. 5.—Of the reading of the deed.*

2016. When it is required by a party, *the deed should be read*. If he is able to read, he should read it himself, and, if he is not able to read it, then he should require it to be read to him; but if, being able to read, he neglect to read it, or if not able, he neglect to ask to have it read, and he sign and execute it, he will be bound by it.(b)

If the deed is read to a blind, or an illiterate man, falsely, with an intent to deceive him, it is a fraud, and the deed is void on this account; but if it be incorrectly read by mistake, although there is no fraud, the deed cannot stand, because the grantor did not intend to execute such a deed as he executed, but such as was read to him.(c) This must be in a case where he is himself acting in good faith, for if he purposely procure some one to read it to him falsely, with an intent to avoid it afterward, he will be bound by it.(d)

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(a) Dougl. 384.

(b) Touchs. 56; Rex v. Longnor, 1 Nev. & Man. 576. Vide Hallenbach v. De Witt, 2 John. 404; Manser's case, 2 Co. R. 3; Thoroughgood's case, 2 Co. R. 9; Shulter's case, 12 Co. R. 90; Anon. Skin. 159; Longchamp v. Fish, 2 Bos. & Pull. N. P. R. 415; Shanks v. Christopher, 3 Marsh. 145; Rossiter v. Simmons, 6 S. & R. 452.

(c) Jackson v. Hayner, 12 John. 469.

(d) Touchst. 56.

*Art. 6.—Of the signing and sealing of the deed.*

2017. Owing to the ignorance of letters, formerly deeds were not signed, but simply sealed. On the continent of Europe, and probably in England, the ecclesiastics, in order to secure the rich legacies which the superstition of the times so liberally bestowed upon them, introduced the practice of signing as well as sealing deeds and acts of the last will of individuals. (a) In the time of the English Charles II., this practice had become so general and was so popular that the statute of 29 Charles II., c. 3, required that deeds and other contracts respecting lands, with the exception of leases for three years, which might be by parol, should be *signed*. The principles of this statute have been generally adopted in this country.

2018. A *signature* is the act of writing down a man's name, either by himself or an authorized agent, at the end of an instrument, to attest its validity. The name thus written is called a signature.

A badly formed signature will not render the deed void, because that relates only to the beauty of the hand writing. Many persons, with an affected show of skill, so write their signatures, that although apparently very elegant, they are absolutely illegible.

2019. The practice of *sealing* deeds is very ancient. It was used on the continent of Europe during the time of Charlemagne, and was probably introduced into England at the time of the Norman conquest. Seals were at first used by the kings and nobles, but by degrees their use became general, and the practice has continued to this day, when owing to the general diffusion of knowledge, the reason for using them has ceased. Still, in a legal point of view they give an efficacy to writings which a simple signature does not bestow upon them. (b)

(a) Merlin, Rép. verbo *Signature*, § 1.

(b) Taylor v. Glazer, 2 S. & R. 502; Mitchel v. Parham, Harper, 1; Hubbard v. Beckwith, 1 Bibb. 492.

The nature and definition of a seal have already been considered.(a)

2020. It is usual in practice for scriveners to prepare the deed and attach the seal to it, it is then signed, the seal is adopted by the grantor and the deed is delivered by him; it is not requisite that a man should appose his seal to the instrument, he may adopt another man's, or two persons may adopt the same seal.(b) Upon the same principle that an individual may adopt any seal he pleases, a corporation may seal a deed with another than their common seal.(c)

*Art. 7.—Of the witnesses to a deed.*

2021. In general there must be two attesting witnesses to a deed. As the parties have the selection of the witnesses, they should take persons who are competent to testify in a court of justice. The witnesses in general state that the deed has been signed and sealed in their presence. "Sealed and delivered in the presence of us," is the usual formula.(d)

*Art. 8.—Of the delivery of a deed.*

2022. Until a deed is delivered, it remains completely in the power of the grantor, and it is of no effect whatever as a conveyance; it must, therefore, be delivered to give validity.(e) By *delivery* is understood

(a) Ante, n. 877.

(b) Mackey v. Bloodgood, 9 John. 285.

(c) Touchst. 57. Sed vide Anon. 12 Mod. 423.

(d) See Courcier v. Graham, 1 Ham. 330; Patterson v. Pease, 5 Ham. 190; Merwin v. Camp, 3 Conn. 35. In Mississippi one subscribing witness to a deed is sufficient. Wilkins v. Wells, 9 S. & M. 325; and in Pennsylvania a deed is valid without any attesting witness. Long v. Ramsay, 1 S. & R. 72.

(e) Hatch v. Hatch, 9 Mass. 307; Jackson v. Leet, 12 Wend. 105; Friesbie v. McCarty, 1 Stew. & Porter, 56; Fay v. Richardson, 7 Pick. 91; Carr v. Hixie, 5 Mason, 60; Alexander v. Bland, Cooke, 431; Hughes v. Easton, 4 J. J. Marsh, 572; 1 John. Cas. 114.

the voluntary transfer of a deed from the grantor to the grantee, in such a manner as to vest a right in the latter and divest it out of the former.

The delivery of a deed is a very important circumstance, because it takes effect *from the time of such delivery*, and not from the time of its date, particularly as regards third persons, creditors for instance.(a) And by the delivery the grantor adopts the seal, and, by parity of reason, the signature on the deed.(b)

The delivery may be made, 1, by the grantor or his attorney; 2, to the grantee or his attorney; 3, by express words or by implication; 4, as absolute or conditional; 5, the delivery must be voluntary.

1. *By whom the delivery must be made.*

2023. The delivery may be made by the *grantor* himself, or by his authorized *agent* or *attorney*. It is not requisite that the attorney should be authorized by writing under seal or even by writing. The appointment to deliver a deed may be verbal, given before the delivery, or the authority of the grantor may be shown by an assent to the act of the attorney; for *omnis ratihabitio mandato equiparatur*. But to authorize an attorney to deliver a deed, he must pursue the authority given to him, or his act will be invalid; if, for example, an illiterate grantor were to put a deed in possession of another, with a request that he should read it, and if it granted a certain estate, that he should deliver it to the grantee, and if it granted another, he should return it to him; and the attorney, after reading it, found it granted the last mentioned estate, and, nevertheless delivered it, such delivery would be void.(c.)

(a) *Harvey v. Alexander*, 1 Rand. 241; *Fairbanks v. Metcalf*, 8 Mass. 230; *Hood v. Brown*, 2 Ham. 268; *Jackson v. Shoonmaker*, 2 John. 230; *Harrington v. Gage*, 6 Verm. 532.

(b) *Perk. s. 130*; 2 *Bl. Com.* 307.

(c) *Touchst.* 57.

2. *To whom the delivery should be made.*

2024. The delivery may be made to the *grantee* or to any one authorized by him; or it may be made to a stranger for and on behalf of the grantee, without any authority; and, in this case, the grantee may confirm the delivery at any time by accepting the deed. (a) But if it be delivered to a stranger without authority, and without any subsequent sanction, the delivery is not sufficient, unless the deed be delivered as an escrow.

3. *Of an express and implied or constructive delivery.*

2025.—1. An *express* delivery is where the grantor or his attorney puts the deed into the possession of the grantee or his attorney, with a view of giving it effect. This is usually done at the time the parties settle, and when the purchase money is paid or secured to be paid.

2026.—2. An *implied* or *constructive* delivery is one which takes place by acts from which it is presumed the grantor intended to deliver the deed, and the grantee to accept it. The books contain numerous cases of this kind, as where a deed was put in the post-office by the grantor, and directed to the grantee; (b) when the parties met, read, signed, and acknowledged a deed before an officer, which was afterward recorded; (c) or where the registry of a deed was made at the request of the grantor, for the use of the grantee, and the grantee subsequently assented to the same, this was considered as equivalent to a delivery, (d) but this is said to be only *prima facie* evidence of it. (e)

(a) *Buffum v. Green*, 5 N. H. Rep. 71; *Hulloch v. Bush*, 2 Root. 26; *Church v. Gillman*, 15 Wend. 656; *Cunning v. Pinkham*, 1 N. H. Rep. 353; *Turner v. Whidden*, 9 Shep. 121.

(b) *M'Kinney v. Rhodes*, 5 Watts, 343.

(c) *Scrugham v. Wood*, 15 Wend. 545.

(d) *Hedge v. Drew*, 12 Pick. 141.

(e) *Chess v. Chess*, 1 Penn. 32. See *Maynard v. Maynard*, 10 Mass. 456; and as to constructive delivery, see *Pennell v. Weyant*, 2 Harring.



4. *The delivery is absolute or conditional.*

2027.—1. A delivery is *absolute* when the deed is delivered to the grantor or his attorney, with a view that it shall take immediate effect, and without any condition whatever. And if it be delivered to the grantee on a certain contingency, the condition is a nullity, and the delivery is absolute.(a)

2028.—2. The deed may be delivered conditionally to a third person, either to be delivered to the grantee without condition, when the rights of the grantee to the deed immediately attach; or it may be delivered as an escrow.

An *escrow* is a conditional delivery of a deed to a stranger, until certain conditions shall be performed, to be then delivered to the grantee. At the time of the delivery, the condition to be performed must be distinctly stated, as, "I deliver to you this deed for A, upon condition that he shall pay you for me one thousand dollars, before you deliver it to him."(b) Until the condition has been performed, and the deed delivered over, the estate does not pass, but remains in the grantor.(c)

In general, an escrow takes effect *from the second delivery*, and is to be considered as the deed of the party from that time, but this general rule does not apply when justice requires a resort to fiction. In a case where a single woman had made a deed, and delivered it as an escrow, and between the time of the delivery and the performance of the condition, she married; in order to prevent injustice, the delivery

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501; *Gilbert v. North Am. Ins. Co.*, 23 Wend. 43; *Green v. Yarnall*, 6 Mis. 326; *Dunn v. Games*, 1 McLean, 321; *Hatch v. Haskins*, 5 Shep. 391; *Hannah v. Swarner*, 8 Watts, 9; *Moore v. Collins*, 4 Dev. 384.

(a) *Foley v. Cowgill*, 5 Blackford, 18; *Touchst.* 59.

(b) *Touchst.* 59.

(c) *Perk.* s. 137, 138; *Touchst.* 59; *Jackson v. Catlin*, 2 John. 248; 5 *Mason*, 60; *Johnson v. Baker*, 4 B. & Ald. 440.

was by a fiction of law, considered as having been made when she delivered the deed as an escrow.(a)

2029. But a distinction must be observed between the delivery of a deed as an escrow, and its delivery to a stranger to be delivered to the grantee *upon the happening of a future event*; for example, where the grantor delivers the instrument *as his deed* to a third person to be delivered over to the grantee when he shall return from Europe, the deed is valid from the beginning, and the third person is but a trustee of it for the grantee.(b)

5. *The delivery must be voluntary.*

2030. No contract whatever can take place without the assent of the parties to it. When a deed is obtained by the grantee, or any one else, from the grantor, *without his consent*, it is clear that there is no delivery. If, therefore, a grantor should by mistake deliver one deed for another, the delivery would be invalid, but, in such case, the grantor would be required to prove the mistake by very clear testimony.

With greater reason will a delivery of a deed be void, where the grantor has been forced by menace, threat or duress to deliver it.

*Art. 9.—Of recording deeds.*

2031. After the deed has been properly made, executed, and delivered, there is still to be performed another act to give it complete validity, not as between the parties, for the grantor is estopped from denying his deed upon its production. But, as between the purchaser and third persons. It has been already observed that the recording of a deed supplies the place of the old livery of seisin, and its being put upon

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(a) Touchs. 59, 60.

(b) Touchs. 59; Perk. s. 143, 144; 6 Mod. 217; 2 Mass. 452.

record is notice to all the world; and if, after such deed has been recorded, the seller should sell again or mortgage the estate so granted, the subsequent buyer or mortgagee would obtain no title.

Recording acts have been passed in all the states of the Union, and if their provisions are observed, the purchaser will be protected. In some of them, the deed may be recorded within a certain time after its execution, some greater, and others a less time, and the recording takes effect, by relation, from the time when the deed was made.

2032. But before a deed can be recorded, it must be acknowledged before a competent officer, according to the local laws, and he must certify that it has been so acknowledged. Married women may convey their lands when joined with their husbands, or convey their right of dower, provided their deeds are acknowledged according to the local laws.(a)

In some states, instead of the grantor's acknowledgment, the grantee may prove the fact of the execution of the deed by an attesting witness; but as a married woman must be examined by the magistrate, she must in general be present and acknowledge the deed.

§ 3.—Of the several parts of a deed.

2033. Although we have in this country simplified our modes of conveyancing, and deeds are more brief than they are in England, yet, still the old forms of deeds are used, sometimes from abundant caution, but generally because such is the practice. A deed might be greatly simplified, as has been well observed by a learned commentator.(b)

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(a) See Bouv. Law Dict. Acknowledgment.

(b) Mr. Chancellor Kent has given the form of a short deed in the 4th vol. of his Com. 461, 4th ed. And in a note he cites from the North American Review for October, 1840, p. 313, where is given a copy of an

The several parts of a deed conveying real estate, are, 1, the premises; 2, the habendum; 3, the tenendum; 4, the reddendum; 5, the conditions; 6, the warranty; 7, the covenants; 8, the conclusion.

*Art. 1.—Of the premises.*

2034. By *premises* is understood all that is contained in a deed which precedes the *habendum*. In this part of the deed are set forth the names of the parties, with their titles and additions; all such deeds, agreements, or matters of fact are recited, as are necessary to explain the reasons upon which the contract is founded. Here also are mentioned the consideration on which the deed is made, and a correct description of the thing granted.

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Egyptian deed, in the Greek language, executed in the year 106 B. C., which he commends for brevity. It is not very dissimilar in its terms to the following, which is translated from the "*Droit Civil Mussulman*," p. 356. "*Praises to God*. Before the very illustrious, the most venerated, the learned of the learned, the light of truth, Saïd Ahmad-ben Abd-el-Aziz, Oadi Maleki, sitting at the tribunal of the city of Algiers, the well-protected; appeared the very venerable and very honorable Saïd Mohamed Ben Ramdham, shoemaker, residing in the city of Algiers, acting as well for himself as for his sister, the lady Fathma Ben Ramdham, as her attorney, by virtue of a power of attorney, regularly passed before the very illustrious and very powerful Cadi of the city of Blida, has declared before us that he sold the whole of a garden situate in the city of Blida, containing two pairs of oxen, three hundred fruit trees of divers kinds, one hundred and twenty-five orange trees, a dwelling-house composed of four rooms, with the right to take water for twenty-four hours every eight days. The said sale is to convey all the right and property to Saïd Moustapha Ben el Khaznadgi, so that he may enjoy it and have complete ownership, as to him shall seem good; and this in consideration of the sum of 1800 boudjoux, paid in cash. The seller acknowledges to have received from the hands of the said purchaser, the said sum, the mention of which, in these presents, shall be a good and valid acquittance to him. The said sale is made, the parties being agreed, and each of them enjoying all the intellectual faculties, sound of body and mind, such as is required and permitted by law. The very illustrious and most learned Cadi has affixed his revered seal to this contract, after having taken cognizance of it, and caused it to be certified by his assessors, the very honored Saïd Cadour and Saïd Abid, whom may God protect and favor. Dated the first tenth day of the month of Safar, in the year of the egira, 1253."

*Art. 2.—Of the habendum.*

2035. The *habendum*, to have, is that part of the deed immediately following the premises, in which it is stated what estate the grantee shall have in the thing granted, its duration, and to what use. It sometimes qualifies the estate, so that the general implication of the estate, which, by the construction of law passes in the premises, may by the habendum be controlled; in which case the habendum may enlarge the estate, but not totally contradict or be repugnant to it.(a)

*Art. 3.—Of the tenendum.*

2036. The *tenendum*, to hold, is the next part of a deed. It was formerly used to express the tenure by which the estate granted was holden; but since all freehold tenures were converted into socage, the tenendum is of no further use, even in England, and is therefore joined to the habendum in this manner; "to have and to hold." The words to hold have now but little meaning in our deeds.

*Art. 4.—Of the reddendum.*

2037. *Reddendum* is a word used substantively, and is that clause in the deed which immediately follows the tenendum; by the reddendum the grantor reserves something new to himself out of that which he before granted; the formula used for this purpose is "yielding and paying."(b)

In every good reddendum or reservation, these things must concur, namely:

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(a) *Stockton v. Martin*, 2 Bay, 471; *Corbin v. Healey*, 20 Pick. 514; *Moss v. Sheldon*, 3 Watts & S. 160; *Snell v. Young*, 3 Iredell, 379; *Haffer v. Irwin*, 4 Dev. & Batt. 433.

(b) These words, when used in a lease, constitute a covenant on the part of the lessee to pay the rent. *Platt on Cov.* 50; 3 Penna. R. 464; 1 B. & Cr. 416.

1. The *reddendum* must be by apt words.

2. It must be of some other thing issuing or coming out of the thing granted, and not a part of the thing itself, nor of something issuing out of another thing.

3. It must be of such thing on which the grantor may resort to distrain.

4. It must be made to the grantors or to some of them, and not to a stranger to the deed.(a)

2038. A distinction must be noticed here, between a *reservation*, which is something created at the time of a grant, which is to be rendered to the grantor, and an *exception* which is an exclusion, of something connected with the thing granted. A grantor *reserves* a rent, which before the lease had no existence; he *excepts* a particular field of a farm on which he wishes to feed his own cattle.

But the difference will be more apparent by considering the nature of an exception, and what is required to make it valid. To make a good exception, these things must concur :

1. The exception must be by apt words, as saving, excepting, etc.

2. It must be of a part of the thing demised, and not of some other thing.

3. It must be of a part only, and not of the whole of the thing demised.

4. It must be of such a thing as is severable from the demised premises, and not of an inseparable incident.

5. It must be of such a thing as he that accepts may have, and which properly belongs to him.

6. It must be a particular thing out of a general, and not a particular thing out of a particular thing.

7. It must be particularly described and set forth ;

(a) Vide 2 Bl. Com. 299 ; Co. Litt. 47 ; Touchs. 80 ; Cruise, Dig. t. 32, c. 24, s. 1 ; Dane's Ab. Index, h. t.

a lease of a tract of land, except one acre, would be void, because that acre was not particularly described.(a)

*Art. 5.—Of the conditions.*

2039. Following the *reddendum* comes the clause containing the conditions. This subject has been fully considered under the title of contracts.(b)

*Art. 6.—Of the warranty.*

2040. The ancient English law relating to warranties of land was full of subtleties and intricacies; it occupied the attention of the most eminent writers of the English law, and it was declared by Lord Coke, that the learning of warranties was one of the most curious and cunning learnings in the law, but it is now of little use, even in England. The warranty was a covenant real by which the grantor of an estate of freehold and his heirs, were bound to warrant the title; and either upon voucher, or judgment in a writ of *warrantia chartæ*, to yield other lands to the value of those from which there had been an eviction by title paramount.(c) The heir of the warrantor was bound only on condition that he had, as assets, other lands of equal value by descent.

2041. Warranties were lineal and collateral.

1. *Lineal*, when the heir derived title to the land warranted, either from or through the ancestor who made the warranty.

2042.—2. *Collateral* warranty was when the heir's title was not derived from the warranting ancestor, and yet it barred the heir from claiming the title from any collateral title, upon the presumption that he might thereafter have assets by descent from or

(a) Woodf. L. & T. 10; Co. Litt. 47, a; Touchs. 77.

(b) Ante, book 2, part 2, t. 4, c. 4.

(c) Co. Litt. 365; Touchs. 181; Bac. Ab. h. t.

through the ancestor; and it imposed upon him the obligation of giving the warrantee other lands, in case of eviction, provided he had assets.(a)

The statute of 4 Anne, c. 16, annulled these collateral warranties which had become so great a grievance.

2043. Warranty, in its original form, it is presumed has never been known in the United States. The more plain and pliable form of a covenant has been adopted in its place; and this covenant, like all other covenants, has always been held to sound in damages, which, after judgment, may be recovered out of the personal or real estate, as in other cases.

*Art. 7.—Of the covenants in a deed.*

2044. The next clause contains the covenants. These are introduced to oblige the parties, or one of them, to do something beneficial to, or to abstain from something, which, if done, might be prejudicial to the other. These covenants are express or implied.

*1. Of express covenants.*

2045. An *express* covenant in a deed is an agreement by which the covenantor undertakes positively and directly to do, or not to do, something.

The usual personal express covenants inserted in a conveyance of the fee are *assertory*, as, that the grantor is lawfully seised; that he has a good right to convey, and that the land is free from incumbrances; if the facts be not so, these covenants are broken the moment the deed is delivered; or such covenants are *promissory*, as, that the grantee shall quietly enjoy, and that the grantor will warrant and defend the title against all lawful claims. The first are purely personal, and the latter are in the nature of real covenants

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(a) 2 Bl. Com. 301, 302.



running with the land conveyed; they descend to heirs, and vest in assignees or the purchaser.

Express covenants may also be introduced that the grantee will do certain things; as when houses and land are demised, the lessee may covenant that he will do repairs and pay the rent. These covenants as well as the promissory covenants of a grantor run with the land; (a) that is, such as affect the land, not only in the hands of the original party but his heirs and assigns; so that he who has the land is subject to the covenant. (b) But the assignee is not liable for a breach committed before his time. (c)

## 2. Of implied covenants.

2046. An *implied* covenant is one which is raised by operation of law from the acts of the parties.

By statutory provision, in Pennsylvania, Alabama, Delaware, Illinois, Indiana, Mississippi and Missouri, the words *grant, bargain and sell* in conveyances in fee, unless restrained specially, amount to a covenant that the grantor was seised of an estate in fee, freed

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(a) The following are instances of covenants running with the land.—1. A covenant of warranty. *De Chaumont v. Forsythe*, 2 Penna. 507; *Suydam v. Jones*, 10 Wend. 180; *Withy v. Mumford*, 5 Cowen, 137; *Wyman v. Ballard*, 12 Mass. 306; *Sprague v. Baker*, 17 Mass. 586; *Williams v. Weatherbee*, 1 Aik. 233; *Mitchell v. Warner*, 5 Conn. 497; *King v. Kerr*, 5 Ham. 156; *Williams v. Beeman*, 2 Dev. 483.—2. A covenant for quiet enjoyment. *Markland v. Crump*, 1 Dev. & Bat. 94.—3. A covenant that neither grantor nor his heirs shall make a claim to the land conveyed. *Fairbanks v. Williamson*, 7 Greenl. 96.—4. A covenant by a tenant to occupy and leave the premises in tenantable repair at the expiration of his term. *Shelby v. Hearne*, 6 Yerg. 512.—5. A covenant to repair. *Dema-rest v. Willard*, 8 Cowen, 206; *Pollard v. Shæffer*, 1 Dall. 210; *Norman v. Wells*, 17 Wend. 148.—6. A covenant to make payment. *Hurst v. Rodney*, 1 Wash. C. C. 375; *Sandwith v. Desilver*, 1 Browne, 221.—7. A covenant to erect buildings in a common or public square, owned by the grantor, in front of the premises conveyed. *Waterton v. Cowen*, 4 Paige, 510.—8. A covenant in a deed of conveyance, that the grantee shall maintain the partition-fence between the lands conveyed and other lands of the grantor. *Kellog v. Robinson*, 6 Verm. 276.

(b) Bac. Ab. Covenant, E.

(c) Com. Dig. Covenant, B 3.

from incumbrances done or suffered by him, and for quiet enjoyment as against his acts.(a)

There are many other instances of implied covenants, not arising from the words of any statute;(b) as, for example, where a lessor grants or demises to his lessee, a house or lands for a certain term, there is an implied covenant against incumbrances.(c) And the words "grant,"(d) "grant and demise,"(e) "demise,"(f) are so many instances of implied covenants; and "yielding and paying," in a lease, is an implied covenant that the tenant will pay the rent.(g)

*Art. 8.—Of the conclusion.*

2047. The last part of a deed is the conclusion. This mentions the execution and the date, either expressly or by reference to the beginning.

A mistake in the date will not vitiate a deed, as it is not a substantial part of it,(h) and if there be an impossible date, as the 32d day of January, it will be equally immaterial.

SECTION 5.—OF THE SEVERAL KINDS OF DEEDS AT COMMON LAW.

2048. Of the various modes of conveyances and the several kinds of deeds mentioned by Blackstone, a number have become obsolete, and the mode of conveyancing in this country has been greatly simplified. We will take a view of those most in use, or which are yet sufficiently interesting to entitle them to a

(a) For the construction of these words, see *Grantz v. Ewalt*, 2 Binn. 25; *Roebuck v. Duprey*, 2 Ala. 535.

(b) *Bac. Ab. Covenant*, B.

(c) *Co. Litt.* 384.

(d) 1 *Mod.* 113; *Freem.* 367; 4 *Taunt.* 609.

(e) 4 *Wend.* 502.

(f) 10 *Mod.* 162; 4 *Co.* 80; 1 *Show.* 79.

(g) 9 *Verm.* 151; 3 *Penna. R.* 461, 464.

(h) *Jackson v. Schoonmaker*, 2 *John.* 235.

place in this section. These are, 1, a feoffment; 2, a grant; 3, an exchange; 4, a partition; 5, a lease; 6, a surrender; 7, a release; 8, a confirmation; 9, a defeasance; 10, an assignment.

§ 1.—Of feoffment.(a)

2049. *Feoffment*, by the ancient law, strictly and properly was the gift or grant of any houses, messuages, lands, or other corporeal and immovable things of like nature, which are hereditable to another in fee simple, that is, to the feoffee and his heirs, forever, by delivery of seisin and possession of the thing given. This mode of conveyance was made in writing, and called a deed or *charter of feoffment*.(b)

The person who made it was called the *feoffor*, and he to whom it was made was denominated the *feoffee*.

(a) See as to feoffment Touchs. 203; 2 Bl. Com. 20; Cruise, Dig. t. 32, c. 4, s. 3; Co. Litt. 9; Bac. Ab. h. t.; Com. Dig. h. t.; 12 Vin. Ab. h. t.; Dane's Ab. c. 104, s. 3, s. 4.

(b) 2 Bl. Com. 310, 521. Mr. Walker, of the Charleston bar, in a very ingenious pamphlet, entitled "An Inquiry into the use and authority of Roman Jurisprudence, in the law concerning real estate," says, page 33, "The feoffment could be made only in open court—*coram paribus curie*. Its effects were very important. The right to the land was in some sort *res judicata*, not only against the feoffor, but also against all *pares curie*—indeed the latter were 'the judges of the feoffor's ability to make the feoffment.' 4 Cruise, 47, s. 25. The *pares* were freeholders bound to attend that court. Hence, all persons interested were present, consenting or in default, and, in either case, concluded by the determination of the court. This is the reason that the feoffment 'cleareth all disseisins, abatements, intrusions and other wrongful or defeasible estates.' He compares it to the *cessio in jure*, which was a form of conveyance in common use in Rome. To make a feoffment, it was required that there should be a feoffor and a feoffee, and that the contract should be completed by means of the court. In Rome a party appeared before a judge at the *forum rei site*, and no where else, and demanded of another a certain piece of land; the latter by agreement did not resist; the judgment was immediately given for the former, and he was put into possession. A contract of this kind was called a *transactio*, and such also is the Latin synonyme of feoffment completed. When the feoffment is made in a court of record it is termed a fine or common recovery."

The feoffment was accompanied by livery of seisin. This operated upon the possession without regard to the estate or interest of the feoffor; when he had a fee it passed a fee, of course; but if he had a mere naked or even a tortious possession, the feoffment still passed a fee on account of the livery of seisin, and actually operated as a disseisin of the freehold.

The conveyance by feoffment, with livery of seisin, has long since become obsolete in England, and, in this country, though the word *enfeoff* is frequently used in deeds of bargain and sale, it has not been used in practice.

### § 2. Of a grant.

2050. Technically speaking, *grants* are applicable to the conveyance of incorporeal rights only, though in its largest sense, the term comprehends every thing which is conveyed, or passed from one to another, and it is applied to the transfer of every species of property. Grant is one of the words commonly used in a deed of bargain and sale, and differs but little from it except in the subject matter; for the operation in grants are *dedi et concessi*, "have given and granted." In a treaty, by the word *grant*, is meant not only a formal grant, but any concession, warrant, order, or permission to survey or settle. Such a grant may be made by law, as well as by a patent pursuant to a law.(a)

The person who makes the grant is called the *grantor*, and he to whom it is made, the *grantee*.

2051. Incorporeal rights are said to *lie in grant* and not in livery, for existing only in idea, in contemplation of law, they cannot be transferred by livery of seisin; at common law a conveyance in writing was necessary to pass an incorporeal hereditament, hence it

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(a) 12 Pet. 410.

is said that incorporeal hereditaments lie in grant, and pass by the delivery of the deed, in contradistinction to a feoffment which might have been made verbally, with livery of seisin, and it was this livery which operated upon the estate.

2052. There were other *distinctions* between a feoffment and a grant. The former operated upon the possession and cleared away all divested estates, all defeasable titles, destroyed contingent remainders, extinguished all powers, and barred the feoffor from all future right, or possibility of right, to the land, and vested an estate of freehold in the feoffee, when the entry of the feoffor was lawful.(a) The latter operated only on the estate or interest the grantor had in the thing granted, and which he could lawfully convey.(b)

2053. By the common law, when the lord granted his seigniorship without the consent of the tenant, or when he granted a rent, in order to render the grant effectual, it was required that the tenant should express his consent to it; this was called an *attornment*.(c) Attornments are rendered unnecessary, even in England, by sundry statutes. They are entirely abolished in the United States.

### § 3.—Of exchange.

2054. *Exchange* is another mode of conveying real estate. It is a mutual grant of *equal interests* in land, the one in consideration of the other.(d) Since the statute of frauds, all exchanges of land must be made in writing.

There are five requisites to a good exchange, without which it cannot exist: 1, that the estates given be

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(a) Touches. 203, 204.

(b) Litt. sec. 608, 609.

(c) Co. Litt. 309; Touches. 253.

(d) 2 Bl. Com. 323; Touches. 289; Litt. sec. 62.

equal; 2, that the word *exchange* be used; for this cannot be supplied by any other word, nor the estate described by any circumlocution; 3, that there be an execution by entry or claim in the lifetime of the parties; 4, that it be of a thing which lies in grant, if it be by deed; 5, that if the lands lie in several counties, it be by deed indented; or if the things lie in grant, though they be in one county.

*Art. 1.—Of the equality of the estate.*

2055. It is only necessary that the equality be in the *quantity* of the estates exchanged; as an estate in fee for an estate in fee, an estate for life for an estate for life; but this equality does not refer to the value, quality, or manner of the estate.<sup>(a)</sup> An estate in joint tenancy may therefore be exchanged for an estate held in common; for the same reason lands may be exchanged for rents, commons, or any other inheritances concerning lands.

*Art. 2.—By what words an exchange may be made.*

2056. Proper technical words must be used, for no circumlocution will supply the word *escambium*, or exchange: from this arises an implied warranty.

An exchange may be made by lease and release, and then the statute of uses executes the possession without entry; and all the incidents annexed to an exchange at common law are still preserved.

*Art. 3.—When an exchange must be executed.*

2057. The exchange must be executed *in the lifetime of the parties*; for as livery of seisin is not required, the parties have no freehold in deed nor in law, in them, till entry. When both parties die

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(a) Litt. § 64, 65.

before the entry of either, the exchange will, therefore, be void; but if one enters, and the other dies before entry, his heir may enter. When the exchange is made by lease and release, this inconvenience is avoided.

*Art. 4.—By what means the exchange must be made.*

2058. Formerly an exchange could be made verbally when the subject of it was not an estate lying in grant, and it was all in one county; when the thing was lying in grant, or the lands were in different counties, it required a deed. Since the statute of frauds the exchange must be by deed.(a)

*Art. 5.—Of exchange in the United States.*

2059. It is said that exchange in this country does not differ from bargain and sale,(b) and in a case where A and B agreed to exchange their farms, and each conveyed his farm nominally for a consideration, the wife of A, who had not joined in the conveyance, was held to be entitled to dower in both farms, this not being technically an exchange.(c)

§ 4.—Of partition.(d)

2060. *Partition* is the division which is made between several persons, of lands, tenements, or hereditaments, or of goods and chattels which belong to them, jointly or in common, as co-heirs or co-proprietors. The term is more technically applied to the division of real estate made between coparceners,

(a) See Touchs. 294.

(b) 4 Dane's Ab. c. 114, n. 30; Oliv. Conv. 248.

(c) *Cass v. Thompson*, 1 N. H. Rep. 65.

(d) See Cruise, t. 32, c. 6; 2 Bl. Com.; Bac. Ab. Coparceners, (C); Id. Joint tenants, (J). As to compulsory partition, see Miller on Part.; Com. Dig. Pleader, 3 F; Id. Parcener, c.; Id. Appx. h. t.; 17 Vin. Ab. 217; Civil Code of Lo. B. 3, t. 1, c. 8; 4 Kent, Com. 364.

joint tenants, or tenants in common. This may be done by an instrument called a *deed of partition*, by which distinct parts of the estate are allotted to the several parties, who take them in severalty.

In the ancient deeds of partition, it was merely agreed that one should enjoy a particular part, and the other another, in severalty; but now it is usual for the parties mutually to assure to each other the different estates which they are to take in severalty, under the partition. In order to make a valid voluntary partition, it must be by deed.

Between coparceners when partition is made there is an implied warranty, because they could be compelled to make partition.(a)

#### § 5.—Of a lease.

2061. In treating of an estate for years, it may be remembered, the nature of a lease was fully considered. This will dispense with a further examination here.(b)

#### § 6.—Of a surrender.

2062. A *surrender*, technically speaking, is the yielding or delivering up of lands or tenements, and the estate a man has therein, unto another who has a higher and greater estate in the same lands or tenements; but it is sometimes applied to other things.(c) A surrender is of a nature directly opposite to a release; for as the latter operates by the greater estate descending upon the less, the former is the falling of a less estate into a greater, by deed.

The instrument by which the conveyance is made, is also called a surrender; he who makes it is the *surrenderor*, and he to whom it is made is the *surrenderee*.

(a) *Weiser v. Weiser*, 5 Watts, 279; Co. Litt. 173, b.; Cruise, Dig. t. 32, c. 6, § 17.

(b) *Ante*, n. 1774.

(c) *Toucha*, 300; Co. Litt., 337 b.



*Art. 1.—Of the requisites to make a good surrender.*

2063. To make a valid surrender of land, the following circumstances are required :

1. That the surrenderor be a person able to make a grant or surrender, and the surrenderee a person able to receive such a surrender.

2. That the surrenderor have, at the time of making it, an estate in possession of the thing surrendered, and not a bare right to it; and the person to whom the surrender is made must have a greater estate immediately, either in remainder or reversion, in which the estate surrendered may merge; for example, if a lessee for life or years be ousted by a stranger, and, while thus out of possession, surrenders to his lessor, the surrender is void, because he had but a right at the time of the surrender.(a)

3. There must at the time be a privity of estate between the parties.(b)

4. That the surrender be by deed, and by proper words. The expressions used in a release or quit claim may be sufficient, but the proper technical words are *surrender and yield up*.(c)

*Art. 2.—Of surrenders by operation of law.*

2064. A surrender of a lease by operation of law takes place where the lessee does some act, or is a party to the doing of some act of notoriety, totally inconsistent with the continuance of his lease, and which would be an invalid act if the lease continued to exist; for example, if a lessee for years accept a new lease from his lessor, the acceptance of such new lease is, of itself, a surrender of the former lease.(d)

(a) Perk. sec. 599, 600.

(b) Plowd. 541; Touchs. 303.

(c) Perk. sec. 607; Com. Dig. Surrender, A.

(d) Doe v. Forward. 3 Ad. & Ell. N. S. 638. See, as to surrenders by operation of law, Matt. on Pres. ch. 13, p. 236; Addison on Com. 658—661.

*Art. 3.—Of the effect of a surrender.*

2065. A surrender immediately *divests* the estate out of the surrenderor and vests it in the surrenderee, for in this case no other is required but the bare grant of the surrenderor. It is true, indeed, that a grant is a contract, and that there must be *actus contra actum*, or a mutual consent; in this case, however, the consent is implied, for a gift imports a benefit, and an assent to it may be fairly presumed.(a)

The effect of the surrender between the parties is complete, and the estate is merged, but it is not so with regard to strangers whose rights are preserved; as, if a lessee for life make a lease for years rendering rent, and the lessee for life surrender his estate; here although the life estate be surrendered, yet the lease for years shall be good; but the surrenderee shall not have the rent reserved upon the lease for years.(b)

*§ 7.—Of a release.*

2066. The word *release* has several meanings. It signifies, in the first place, the giving up or discharging of a right of action which a man has, or claims to have against another, or that which is his;(c) and, in the second place, it means “a conveyance of a man’s interest or right, which he hath unto a thing, to another that hath the possession thereof, or some estate therein.”(d) It is here used only in the latter sense. A release, as has been before observed, is the reverse of a surrender. It transfers the greater estate of a man out of possession to the releasee, who is in possession; an example will make this manifest: where a man is disseised, the disseisor acquires the possession,

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(a) Bouv. Law Dict. Assent.

(b) Touchs. 301.

(c) Touchs. 320; Bac. Ab. h. t.; Co. Litt. 264, a.

(d) Touchs. 320.

and the right of possession and of property remains in the disseisee. Now if the disseisee agrees to convey his right to the disseisor, the proper mode of carrying such an agreement into execution is by a release.

He who makes a release is called the *releasor*, and he to whom it is made, is the *releasee*.

*Art. 1.—By what words a release may be made.*

2067. The words generally used in a release, are, “remised, released, and forever quit claimed.”(a) When the words are to raise an estate, it is usual and most safe to specify what estate the releasee shall have. This is requisite in most cases, for when a release inures by way of enlargement of the estate, no estate in fee simple will pass without words of inheritance. If, therefore, Peter make a lease to Paul, and afterward, Peter makes a release to Paul of all his right, without saying more, the estate is not thereby enlarged.(b)

*Art. 2.—How a release inures.*

2068. A release may inure in various ways, the principal of which, are the following:

1. By way of passing the estate, or *mitter l’estate*. When two or more persons become seised of the same estate by a joint title, either by contract or by descent, as joint tenants or coparceners, and one of them releases his right to the other, such release is said to inure by way of *mitter l’estate*, and this passes the fee simple to the whole.(c)

2: By way of passing the right, or *mitter le droit*; as where the disseisee releases to the disseisor, or to the heir or feoffee of the disseisor, who being in possession, is capable of taking a release of the right; as

(a) Touchs. 320.

(b) Touchs. 327.

(c) Litt. § 304; Co. Litt. 273, b; Gilb. Ten. 72.

in cases of this kind nothing but the bare right passes, the release is said to inure by way of *mitter le droit* or passing the right.(a)

3. By way of enlarging the estate, or *enlarger l'estate*; as when right and the possession are separated for a particular time; and he who has the reversion and inheritance, releases all his rights and interests in the land, to the person who has the particular estate. A release of this kind is said to inure by way of enlarging the estate, and to amount to a grant and an attornment. To render this release good, it is requisite there should be a privity of estate between the releasor and the releasee, and also that the releasee should have such an estate as is capable of being enlarged.(b)

4. By way of extinguishment: as if my tenant for life makes a lease to A for life, remainder to B and his heirs, and I release to A; this extinguishes my right to the reversion, and shall inure to the advantage of B's remainder as well as of A's particular estate.(c)

*Art. 8.—What estate may be released.*

2069. All interests, rights and profits arising out of, or annexed to land, may be released; but a mere possibility cannot be released; thus the heir apparent of a disseisee cannot release the disseisor, and; if he do, on inheriting the land, he may assert his title. It is said a freehold right or title may be released in five ways:

1. To the tenant of the freehold, in fact or in law, without any privity.

2. To the remainder man.

3. To the reversioner, without privity.

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(a) Litt. § 466; Gilb. Ten. 55; Touchs. 321.

(b) Cruise, Dig. tit. 32, c. 6, 1, 33.

(c) Litt. § 465; Co. Litt. 272, b; Touchs. 321.

4. To one having a right only by privity.
5. To one having a privity only, without a right.(a)

*Art. 4.—How releases are considered in the United States.*

2070. The technical principles relating to a release do not appear to be applicable, generally, in this country. A *quit claim deed* has, with us, nearly the same effect as a release at common law; the words which are effective in it are the same as in a release, “release, remise and quit claim.” In these the grantor does not warrant against a paramount or adverse title, but only against himself and those who claim under him.

When a deed cannot be supported as a release, the courts will give it effect, by treating it as a confirmation,(b) or as a bargain and sale,(c) if there be no rule of law adverse to such construction.

§ 8.—Of a confirmation.

2071. A *confirmation* is nearly allied to a release. It is defined by Coke to be “a conveyance of an estate, or right *in esse*, whereby a voidable estate is made sure and unavoidable; or where a particular estate is increased.”(d)

The first part of this definition may be illustrated by the following case, put by Littleton,(e) where a person lets land to another for the term of his life, who lets it to another for forty years, by force of which he is in possession; if the lessor for life confirms the estate to the tenant for years, by deed, and, afterward, the tenant for life dies, during the term, this

(a) Lamper's case, 10 Co. 46; Gilb. Ten. 53; Co. Litt. 265, a.

(b) Oakes v. Marcy, 10 Pick. 195.

(c) Jackson v. Fish, 10 John. 456; Pray v. Pierce, 7 Mass. 381; Russell v. Coffin, 8 Pick. 143. Sed vide Carroll v. Norwood, 5 Har. & John. 158.

(d) Co. Litt. 295. See Touchs. 311; Gilb. Ten. 75; 2 Bl. Com. 325.

(e) § 516.

deed will operate as a confirmation of the term for years. As to the latter branch of the definition, where a confirmation operates by way of increasing the estate, it is similar in every respect to a release that operates by way of enlargement, for there must be a privity of estate and proper words of limitation.

He who makes the confirmation is called the *confirmor*, and he to whom it is made, the *confirmeer*.

*Art. 1.—Of the requisites of a confirmation.*

2072. The principal requisites to a good confirmation, are the following :

1. That there be a good confirmor and a good confirmeer, and a thing to be confirmed, as in other grants.

2. That there be a precedent rightful or wrongful estate in the confirmeer, in his own or another's right ; or at least he must have possession of the thing which is to be confirmed to him, as a foundation for the confirmation to work upon ; for if there be no precedent estate on which the confirmation may work, or the estate be actually void, and not merely voidable, then the confirmation is void, and cannot take effect as a confirmation : *debile fundamentum fallit opus*.

3. The confirmor must have such an estate and property in the thing respecting which confirmation is made, that he may be able to confirm the estate to the confirmeer.

4. The precedent estate must continue until the confirmation is made ; as in all cases of voidable estates, the confirmation must be made before the estate has been avoided, for otherwise the confirmation will be void.

5. The precedent estate, and that which is to be confirmed, must be lawful and not prohibited by law.

6. The confirmation must be made by apt words in the deed or instrument. Though the most proper technical words of a confirmation are *ratify*, *approve*,

and confirm, yet the words *give and grant* may have the same effect.(a)

*Art. 2.—Of the effect of a confirmation.*

2073. There is a distinction in the confirmation of an estate of freehold and an estate less than freehold. The latter may be confirmed *in part only*, but the former cannot be so confirmed. A confirmation of an estate of freehold, even for one hour, is a confirmation of the whole estate.(b)

When the disseisor has leased for years, the disseisee may confirm the interest of the lessee in part; but this must be done by confirming the land for a part of the time, not by first confirming the lease or the estate of the lessee, and then adding for a part of the time, for that is repugnant to the former confirmation.

A confirmation does not strengthen a void estate. *Confirmatio est nulla, ubi donum precedens est invalidum, et ubi donatio nulla est nec valebit confirmatio.* For confirmation may make a voidable or defeasible estate good, but cannot operate on an estate void in law.(c) The civil law agrees with this rule, and hence the maxim, *qui confirmat nihil dat.*(d)

§ 9.—Of a defeasance.(e)

2074. A *defeasance* is an instrument which defeats the force or operation of some other instrument, or deed or estate. That which in the same deed is called a condition, in another deed is called a defeasance.(f)

(a) Touchs. 314; Litt. § 531.

(b) Touchs. 317; Cruise, tit. 32, c. 6, s. 54; Co. Litt. 297, a.

(c) Co. Litt. 295.

(d) 8 Toull. n. 476.

(e) Vin. Ab. h. t.; Nelson's Ab. h. t.; Bac. Ab. Index, h. t.; Dane's Ab. Index, h. t.; Lilly's Reg. h. t.; Com. Dig. h. t.; Com. Dig. Pleader, 2 W. 35; 2 Saund. 47 n. note (1); Cruise, Dig. tit. 32, c. 7, s. 25; Touchs. 396.

(f) Cruise, Dig. t. 32, c. 7, s. 27.

As a general rule, the defeasance must be a part of the same transaction with the conveyance; though the defeasance may be dated after the deed.(a)

2075. The principal requisites of a good defeasance are :

1. That it be made *eodem modo*, as the thing to be defeated is created.

2. That it recite the deed which is to be defeated correctly; a recital that the deed bears date the first day of May, will not defeat a deed bearing date the tenth day of May.

3. That it be made between the same persons who are parties to the first deed.

4. That it be made after the making of the first deed, and not before; but if dated before and it be delivered after, it will be sufficient.

5. That it be made of a thing defeasible.

§ 10.—Of an assignment.

2076. In common parlance, an *assignment* signifies the transfer of all kinds of property, real, personal, and mixed, and whether the same be in possession, or in action. In a more technical sense, and in that in which it is here employed, an *assignment* is a transfer of a term of years; but it is used to signify the transfer of some particular estate or interest in lands. The deed or instrument which contains the agreement is also called an assignment. The person who makes the assignment is denominated the *assignor*, and the person to whom it is made, the *assignee*.

A distinction must be observed between an assignment of a term of years, and an underlease. The assignment transfers the whole interest of the assignor, whereas an underlease transfers only a part of the

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(a) *Harrison v. The Trustees of Phillips' Academy*, 12 Mass. 456; *Lund v. Lund*, 1 N. H. Rep. 41; *Bodwell v. Webster*, 13 Pick. 413. See vide 4 Yerg. 57.



estate, or, if it transfer the whole, it is only for a limited time, less than the assignor has in the same.

2077. The technical words of an assignment are, *assign, transfer and set over*, but the words *grant, bargain and sell*, or any words which show the intention of the parties to make a complete transfer, will amount to an assignment.

2078. As to the things which may be assigned, it may be observed that every estate and interest in lands and tenements may be assigned, and also all present and certain estate or interest in incorporeal hereditaments, as rents, and the like; even though the interest be future, as a term of years, to commence at a subsequent period; for the interest is vested in *presenti*, though only to take effect in *futuro*.(a)

#### SECTION 6.—OF CONVEYANCES UNDER THE STATUTE OF USES.

2079. In a former chapter we considered the nature of uses. But the deeds which arose in consequence of the statute of uses were not then made the subject of inquiry, as they more properly belong to this part of the work. These are, 1, bargain and sale; 2, lease and release; 3, covenants to stand seised to uses; 4 deeds to lead and declare uses; 5, deeds of revocation of uses.

##### § 1.—Of bargain and sale.

2080. *Bargain and sale* is a contract by which a person conveys his lands to another for a pecuniary consideration. The deed by which such contract is witnessed is also called a bargain and sale. It differs from a gift, which is a transfer of property gratuitously, without any consideration, and a bargain and sale must have a consideration. It is unlike an

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(a) Co. Litt. 214, a.

exchange, which is a transfer of one estate for another.(a)

He who sells is the *bargainor*, and he to whom the sale is made is called the *bargainee*.

In consequence of this conveyance a use arises to the bargainee, and the statute of 27 Henry VIII., immediately transfers the legal estate and the possession to him. The principles of this statute have been generally adopted in the United States, and this kind of conveyance is the most common in this country.

*Art. 1.—Of the requisites of a deed of bargain and sale.*

2081. These are, 1, a bargain and sale of land must be in writing or by deed.

2. The words *bargain and sale* are not indispensable to this contract; for words equivalent will suffice to make the land pass by way of bargain and sale.

3. There must be a consideration given, or at least said to be given, for the land.

4. The deed must be recorded within the time prescribed by the statute law of the state where the land lies; for this is in the place of livery of seisin.(b) But a lease for years is not in general required to be recorded, though the statutes of some of the states require that they shall be recorded.

*Art. 2.—Of the estate which passes by bargain and sale.*

2082. Generally all things grantable by any other conveyance, are grantable by a bargain and sale; and therefore, lands, rents, profits and the like, pass by this conveyance, and for any estate, as a fee simple, an estate for life, or years.(c) When the bargainor has

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(a) Ward v. Lambert, Cro. Eliz. 394; Cro. Jac. 127; 1 Vent. 137; 1 Leon. 194; Cheney v. Watkins, 1 Har. & John. 527.

(b) Touchs. 223.

(c) Touchs. 222.

an estate for years only, it will not pass by a deed of bargain and sale, because his estate is not such as enables him to be seised to a use; but an estate less than a fee may pass by bargain and sale, provided the bargainor has a freehold.(a)

§ 2.—Of lease and release.(b)

2083. In order to avoid the provisions of the statute of uses, 27 Hen. VIII., c. 16, which required that bargains and sales to pass a freehold, should be recorded, it occurred to Serjeant Moore, soon after the passage of the statute, to make a lease and then to release to the tenant, and this mode of conveyance obtained the name of lease and release. It is thus contrived: a lease, or rather a bargain and sale, upon some pecuniary consideration, for one year, is made by the tenant of the freehold to the lessee or bargainee; this is good without enrolment, for the statute does not require any enrolment of a term for years, and the bargainor stands seised to the use of the bargainee, and vests in him the use for one year, and immediately the statute annexes the possession. Being then in possession, he is capable of receiving a release of the freehold and reversion, which must be made to the tenant in possession; and accordingly the next day a release is granted to him, which completes his title.

The lease and release, when used as a conveyance of the fee, have, jointly, the operation of a single conveyance. By the recording acts in this country, they are generally required to be recorded, and this mode of conveyance is seldom used.

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(a) Cruise, Dig. tit. 32, c. 9, s. 21.

(b) 2 Bl. Com. 338; Co. Litt. 207; Cruise, Dig. tit. 32, c. 11; 2 Preston on Conv. 212; 1 Saund. 251, n. (2); Bac. Ab. Index, h. t.

## § 3.—Of covenants to stand seised to uses.(a)

2084. A covenant to *stand seised to uses* is a species of conveyance which derives its effect from the statute of uses, by which a man, seised of lands, covenants, in consideration of blood or marriage, that he will stand seised of the same, to the use of his child, wife, or kinsman, for life, in tail or in fee.

On executing the covenant, the covenantee becomes seised of the use of the land, according to the terms of the use, and the statute immediately annexes the possession to the use. This conveyance has the same force and effect as a common deed of bargain and sale; the great distinction between them is that the former can only be made use of among near domestic relations, for it must be founded on blood or marriage.(b)

The technical words to create this conveyance, are, *covenant to stand seised to the use of A*, etc. But other words will have that effect, if it appear to have been the intention of the parties to use them for that purpose: the words bargain and sell were held to be sufficient.(c)

The principal requisites of a covenant to stand seised to uses, are,

1. That there be a sufficient and proper consideration of blood and marriage, that being the most common and suitable one.

2. That there be a proper deed.

3. That the deed contain apt words.(d)

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(a) Lilly's Reg. h. t.; Cruise, Dig. tit. 32, c. 10; 1 Vern. by Raithby, 40, note.

(b) 2 Bl. Com. 338.

(c) Cruise, Dig. t. 32, c. 10, s. 3.

(d) See French v. French, 3 N. H. Rep. 258; Jackson v. McKinney, 3 Wend. 233; Rowlets v. Daniel, 4 Munf. 473; Pledger v. David, 4 Desaus. 264.

§ 4.—Of deeds to lead the uses, and to declare the uses.

2085. In England, when deeds are executed prior to fines and recoveries, they are called *deeds to lead the uses*; when subsequent to fines and recoveries, *deeds to declare the uses*.

§ 5.—Deeds of revocation of uses.

2086. Deeds of *revocation of uses* are those by which a revocation of the use is made, by virtue of a power, reserved at the raising of the uses, to revoke such as were then declared, and to appoint others in their stead, which is incident to the power of revocation.

2087. Having taken a rapid view of alienation by deed, as well at common law, as under the statute of uses, in the next chapter will be considered alienations by matter of record.

CHAPTER II.—OF ALIENATIONS BY MATTER OF RECORD.

2088. Alienations by matter of record are, 1, by acts of the legislature, and patents; 2, fines and recoveries.

SECTION 1.—OF ALIENATIONS BY ACTS OF THE LEGISLATURE,  
AND PATENTS. (a)

2089. Grants and concessions have been made by many of the states of the Union, by authority of the legislature, either by public and general laws, under which certain officers have given titles under the name of *patents*. These are very numerous, and made in the different states by virtue of the laws of their

(a) See 2 Hilliard's Abr. of the Am. Law of Prop. c. 24, for a detailed account of public grants.

respective legislatures. It would be very difficult to detail all their provisions, and it is not within the plan of this work, which professes to examine only general principles and rules, to consider such local matters.

2090. The colonial governments of France and Spain also granted many concessions and titles to land, under special circumstances, to many individuals, and not unfrequently the validity of these claims has been examined in our courts.(a)

2091. The public lands of the United States are generally surveyed in townships of six miles square: these are subdivided into sections of six hundred and forty acres; and the sections into half and quarter sections; and these again into quarter quarter sections. The lines in these cases run north and south, and east and west; when a quarter section is divided, the line runs north and south.

These lands are in some instances directed to be sold at public sale, and then the government grants a patent to the grantee, giving all the title the United States had in the land, with a reservation of a certain proportion of all the gold and silver found therein. But, more generally, they are selected by purchasers who enter them at the regular land offices, and, after they have been paid for, a patent is granted to the purchaser. But a title to lands, or a grant, (by which is meant not only a formal grant, but a concession,) may be made and confirmed by law, as well as by a patent pursuant to law.(b)

A patent is declared by the whole legislation of congress to be the superior and conclusive evidence of legal title.(c) But such a patent cannot effect a pre-existing title.(d) Until the patent issues, the fee is in

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(a) See White's New Coll.

(b) *Struther v. Lucas*, 12 Pet. 410.

(c) *Bagwell v. Broderick*, 13 Pet. 436.

(d) *New Orleans v. Armas*, 9 Pet. 236.

the government, which, by the patent, passes to the patentee;(a) and if the land is unimproved, and wholly unoccupied, it gives legal seisin and constructive possession of all the land within the survey.(b)

As the patent is the deliberate act of the government, it is presumed that every thing required to be done before it is granted has been done, and no facts behind the patent will be investigated. It is sufficient that the land is identified; if so, the defect of an entry and survey cannot be taken advantage of at law.(c) But when an elder equitable right is set up, a court of equity may inquire into the preliminary steps.(d)

But though the patent has this binding effect, it gives no title unless authorized by law; a patent for lands lying within the Indian territory, which could not be sold under the laws of the United States, would, therefore, be invalid; this, however, would take place only when there was no power to issue it, for if a patent were issued for a tract of land, and a part was within the boundaries authorized to be sold, and part beyond it, such patent would be valid for a part and void as to the rest.(e)

#### SECTION 2.—OF FINES AND RECOVERIES.(f)

2092. Fines and common recoveries are conveyances of record, and both founded on fictions. The origin of both these conveyances was to avoid the necessity of livery of seisin, and, under the form of a suit, or legal proceeding, to obtain title to the land. Though they

(a) 13 Pet. 436.

(b) *Peyton v. Stith*, 5 Pet. 485; *Miller v. McIntyre*, 6 Pet. 61.

(c) *Lessee of Brown v. Galloway*, Pet. C. C. R. 291.

(d) *Boardman v. Lessee of Reed and Ford*, 6 Pet. 328; *Vowles v. Craig*, 8 Cranch, 371.

(e) *Winn v. Patterson*, 9 Pet. 663; *Patterson v. Jenks*, 2 Pet. 235; *Danforth v. Wear*, 9 Wheat. 673.

(f) *Cruise on Fines*; *Shep. Touchs. c. 2*; *Bac. Ab. h. t.*; *Piggot, Preston, Wilson, Bailey, Hands, h. t.*; *Com. Dig. h. t.*

have been used in some of the states, these forms of conveyance are nearly obsolete; easier and less expensive modes of making conveyances which have their effect, having been substituted.

§ 1.—Of fines.

2093. A *fine* is an amicable composition or agreement of a suit, actual or fictitious, by leave of the court, by which the lands in question in such suit become, or are acknowledged to be, the right of one of the parties. (a) A fine is so called, because it puts and *end*, fin, not only to the suit thus commenced, but also to all other suits and controversies concerning the same matter.

2094. The statute of 18 Edw. I., called *modus levandi fines*, declares and regulates the manner in which they should be levied and carried on; and that is as follows:

1. The party to whom the land is conveyed or assured, commences an action at law against the other, generally an action of covenant, on a pretended contract, by suing out a writ of *præcipe*, called a writ of covenant, that the one shall convey the lands to the other, on the breach of which agreement the action is brought. The suit being thus commenced, then follows,

2. The *licentia concordi*, or leave to compromise the suit which is asked of the court, and granted of course.

3. The *concord*, or agreement itself, after leave obtained by the court; this is generally an acknowledgment from the deforciant, that the lands in question are the lands of the complainant.

4. The *note* of the fine, which is only an abstract of the writ of covenant, and the concord; naming the parties, the parcels of land, and the agreement.

5. The *foot* of the fine, or the conclusion of it, which

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(a) Co. Litt. 120; 2 Bl. Com. 349.



includes the whole matter, reciting the parties, day, year and place, and before whom it was acknowledged or levied.

2095. The force and effect of a fine were very great; it barred not only those who were parties to the fine, and their heirs, but all other persons in the world, of full age, of sound memory, and within the four seas, the day the fine levied, unless they put in their claims within a year and a day.<sup>(a)</sup> But this bar by non-claim was afterward extended to five years.<sup>(b)</sup>

There were four kinds of fines, but the learning in relation to them will not repay the student for his trouble, except as a matter of the history of the law.

#### § 2. Of common recoveries.<sup>(c)</sup>

2096. A *common recovery* is a judgment recovered in a fictitious suit, brought against the tenant of the freehold, in consequence of a default made by the person who is last vouched to warranty in such suit.<sup>(d)</sup>

Common recoveries are considered mere forms of conveyance or common assurances; they were invented by ecclesiastics in order to evade the statute of mortmain, by which they were prohibited from purchasing or receiving, under the pretence of a free gift, any lands or tenements whatever.

2097. Although a common recovery is a fictitious suit, yet the same mode of proceeding must be pursued, and all the forms strictly adhered to, which are necessary to be observed in an adversary suit. The proceedings are as follows:

1. The first requisite is, that the person who is to be the demandant, and to whom the lands are to be

(a) Stat. 18 Ed. I.

(b) Stat. 4, Hen. VII. See *Jackson v. Smith*, 13 John. 426; *Lion v. Burtris*, 20 John. 483.

(c) Cruise, Dig. tit. 36; 2 Saund. 42, n. 7; Piggot on Com. Rec.; and Rey, *Des Institutions Judiciaires de l'Angleterre*, tom. ii, p. 221.

(d) Bac. Tracts, 148.

adjudged, should sue out a writ or *præcipe*, against the tenant of the freehold, who is then called *tenant to the præcipe*.

2. In obedience to this writ, the tenant appears in court, either in person or by his attorney; but instead of defending the title to the land himself, he calls on some other person who upon the original purchase is supposed to have warranted the title, and prays that the person may be called in to defend the title which he warranted, or otherwise to give the tenant lands of equal value to those he shall lose by the defect of his warranty. This is called the *voucher*, *vocatia*, or *calling to warranty*.

3. The person thus called to warrant, who is usually called the *vouchee*, appears in court, is impleaded, and enters into the warranty, by which he means to take upon himself the defence of the land.

4. The defendant then desires of the court leave to imparl, or confer with the vouchee in private, which is granted of course.

5. Soon after the demandant returns into court, but the vouchee disappears and makes default, in consequence of which, it is presumed by the court, that he has no title to the lands demanded in the writ, and therefore cannot defend them, whereupon judgment is given for the demandant, now called the *recoverer*, to recover the lands in question against the tenant, and for the tenant to recover against the vouchee lands of equal value, in recompense for those warranted him, and now lost by his default. This is called the *recompense of recovery in value*; but as it is customary for the crier of the court to act, who is hence called the *common vouchee*, the tenant can only have nominal, and not a real recompense for the lands thus recovered against him by the demandant.

6. A writ of *habere facias* is then sued out, directed to the sheriff of the county in which the lands thus recovered are situated, commanding the sheriff to give

the possession of the lands to the plaintiff; and on the return of the execution of the writ, the recovery is completed. And, thus, the wary ecclesiastics, always eager for power and wealth, used the forms of the law, for the very purpose of defeating the law itself.

2098. The recovery here described, is with *single voucher*; but a recovery may, and is frequently suffered with double, treble, or further voucher, as the exigency of the case may require, in which case there are several judgments against the several vouchees.

All the learning in relation to common recoveries is nearly obsolete, as they are nearly out of use. In some of the states of the Union, they have occasionally been employed to bar estates entailed, but statutory provisions have been made which facilitate the barring of such estates, so as to render common recoveries unnecessary. Indeed, they ought to have been considered a disgrace to any system of law, founded on justice and right.

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#### CHAPTER III.—OF DEVISES.

2099. Having considered the mode of acquiring property by descent; by escheats; by forfeiture; by merger; and by alienation by deeds, at common law and under the statute of uses; and by matter of record; it now remains to be ascertained, lastly, how property is acquired by will or devise.

As wills generally relate to all a man's property or estate, real or personal, it will be requisite, in order to do justice to the subject, to treat as well of personal as of real estate.

This subject will be considered by taking a view of, 1, the history of devises and the power of making wills; 2, the qualities requisite in a testator; 3, the qualities and description requisite in a devisee; 4, the thing devised, and what estate is devised in the same;

5, the form of wills; 6, of the kinds of wills; 7, of the revocation of wills; 8, of the republication of wills; 9, of executors and administrators.

SECTION 1.—OF THE HISTORY OF DEVISES AND OF THE RIGHT OF MAKING WILLS.

2100. A *will* is the legal declaration of a man's intentions of what he wills to be performed after his death. The terms *will* and *testament* are synonymous, and they are used indifferently, or one for another, by common lawyers. When a will operates upon personal property, it is simply called a *will* or *testament*, when upon real estate a *devise*, though *devise* sometimes signifies the estate given by the will, and not the will itself. The definition of the civil law corresponds with the above; a will by that law is declared to be as follows: *Testamentum est voluntatis nostræ justa sententia de eo quod quis post mortem suam fieri velit.*(a)

2101. A testamentary disposition being an act by which the testator disposes of his estate during a time when he shall no longer exist, it may be well inquired whence does man acquire this right of empire, which extends beyond his life, over property which no longer belongs to him. Does he derive this authority from nature, or from the civil or municipal law?

This question, so often and so variously agitated by different authors, will not be found difficult to resolve, when we reflect on the origin of property. We have seen that before the establishment of the civil estate, property was inseparable from possession; that, in fact, it was only the right to enjoy it, while it was possessed, and that as soon as the party ceased to possess, the thing became subject to the use of the first occupant.

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(a) Dig. 28, 1, 1.

In such a state of things, it is evident that the mere will of the possessor was not sufficient to transfer his right to another. It could be transferred only by delivery or putting the party in possession. There could then exist no other testaments than those of a gift *causa mortis*, accompanied by delivery, resolvable by the recovery of the donor.

2102. When the right to property became permanent, that is, when the owner acquired the right, by the municipal law, to recover from a new possessor the possession which he had lost, he could then transmit this right by an agreement with another person, whom he put in his place; but this faculty could not extend beyond his life. It seems like a contradiction that a man should, by preserving all his rights while he is living, still transfer them for a time when he shall no longer exist; that he may transfer a right, not at the present time, but for a time when such a right shall have been lost to him forever.(a)

It may be easily conceived that a man may transfer his actual rights, and delay the execution of the agreement until after his death, because, in such case, the moment when the event arises, the donee finds himself invested with a right acquired by virtue of the agreement. But it is difficult to conceive that the mere will of a man should create a right in favor of one who knows nothing about the matter, nor concurred, in the lifetime of the testator, by accepting the gift; nor that the devisee or legatee should acquire a right by accepting, after his death, the offers of a man who no longer exists, and whom death has stripped of all his rights.

2103. Either the municipal law has regulated the order of the transmission of property, and then, before the property of the dying owner has passed to those to whom he wished to bestow it, the law has cast the

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(a) Heinec. de jure nat. lib. 1, § 287 et. seq.

right upon those who have been designated by its provisions; or, the municipal law has not made any provision for the transmission of the property of the deceased, and, in this case, the rights to it are acquired to the first occupant by the right of occupancy, immediately after his death.

The right of making a will, then, is derived from the municipal law, and in most nations, perhaps all over the civilized world, this right exists, regulated and modified according to the municipal laws of each country.

This right was established from motives both public and private. Society would return to chaos and disorder, if the estate of every man who dies was subject to become the property of the first occupant. It is then requisite that the law should regulate the manner of transmitting estates from one generation to another.

But as the law cannot designate the individuals of each family who are the most deserving, it has confided this matter to the care of the owner, who must be acquainted with the merit of each one of those dependent on him.

2104. The power of devising was committed to him as a branch of the legislative power, as a species of magistracy, to be used for the encouragement and reward of virtue, and to repress and punish vice in the bosom of his family. The Romans considered the power of testing in this point of view; a testament was a law: *Pater familias uti legassit ità jus esto, dicat testator et erit lex*. It was there, as with us, that the general law transmitting estates from the deceased to others, took effect only when there was no provision made by this particular law, called a will or testament.

On the other hand the power of devising his property, was given to the owner as an arm to compel obedience, when all other means should fail. An old man who should have no power to give to others, or

to deprive them of a benefit, might be exposed, and be bereft of help when he most needed it, if he could not reward faithful services, acknowledge the zeal and devotedness of friendship, and punish the neglect of ungrateful relations.

Besides, after the happiness of religion, the sweetest consolations of a dying man consist in making a last distribution of his patrimony, as wisdom and justice may require.

2105. The right of devising property was practiced in England at a very early period of her history, and fully established by statutes of 32 Henry VIII., and 29 Charles II. The law of devise was imported into this country by the first settlers, and incorporated into our colonial jurisprudence, with various modifications, generally an improvement on the original. The power of devising lands prevails in every state of the Union, subject of course to the special provisions of the laws of each, where the lands are located.

SECTION 2.—OF THE QUALITIES REQUISITE IN A TESTATOR,  
AND OF THEIR NUMBER.

2106. All persons are capable of making a will unless restricted by law. As the subject is of much importance, it is proposed to consider it somewhat in detail. For the purpose of ascertaining who are subject to the disqualification, this section will be divided into the following heads: 1, of those who are presumed not to know what they are doing; 2, of those who, having understanding, are under the control of others; 3, of the time when the disability attaches; 4, of the number of testators.

§ 1.—Of those who are presumed not to know what they are doing.

2107. There are three causes which may prevent a testator, in the eye of the law, from knowing what he

is doing. These are, 1, want of mind; 2, bodily defects; 3, inability on account of age.

*Art. 1.—Of the want of mind.*

2108. To make a will, a man must be of *sound mind and memory*, and this rule is but the echo of the Roman law, or rather of common sense; for a testament must be the last will of him who makes it, and if he is not of sound mind, he can have no will.

But a question arises, what is soundness or unsoundness of mind? By *sound mind* is meant that state of a man's mind which enables him to reason, and come to a judgment upon ordinary subjects, like other rational men. The words *unsound mind* and *unsound memory* have been used in several statutes, and sometimes indiscriminately, to signify not only lunacy, which is periodical madness, but also a permanent adventitious insanity as distinguished from idiocy.(a)

It is not necessary, in order to establish this unsoundness of mind, that the testator should have been so found by proceedings in lunacy, for although all persons are presumed to be of sound mind unless so found, yet such imbecility or insanity may be established by proof of matter *in pays*. But, it must be remembered, that this rule does not apply in cases where the law deprives a man of the administration of his affairs, on account of his prodigality, drunkenness and the like; in these cases if the fact be not found, under the statutes, which authorizes the proceedings, the incapacity cannot be shown, unless such acts prove unsoundness of mind, or they are a fraud upon the testator.

2109. The acts which may be classed under the

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(a) Lord Ely's case, 1 Ridg. P. O. 518; *Ex parte Barnsley*, 3 Atk. 171; Shelf. on Lun. 5; Ray, Med. Jur. Prel. § 8; Haal. Med. Jur. 336; Beck, Med. Jur. 573.



head of *unsound mind* are extremely numerous, they manifest themselves in a thousand ways: sometimes they affect only some particular subject, as monomania; at other times they extend generally over all a man's actions; they are continued without interval, or there are times when the unfortunate party who is the subject of them appears temporarily cured; they apply to all persons or only to some particular individuals. The insane man is sometimes furious, at other times gentle and imbecile; the incapacity arises from a congenital defect, from an obstacle to the development of the faculties, or from an accidental injury.

It is impossible to treat of all these causes of unsoundness of mind, within the bounds which our work admits. The principal, which occupy the courts, are delusion and lucid intervals.

2110. By *delusion* is meant the state of mind of an individual who conceives something extravagant to exist, which has no existence; and who is incapable of being reasoned out of that absurd conception. For example, should a parent unjustly persist, without the least ground, in attributing to his daughter a continued course of propensities and vices, there not being the slightest pretence or color of reason for the supposition, a just inference of insanity or delusion is presented to the minds of a jury, because a supposition long entertained and persisted in, after argument to the contrary, and against the natural affections of a parent, suggest that he must labor under a morbid mental delusion.<sup>(a)</sup>

2111. A *lucid interval* is that space of time between two fits of insanity, during which a person *non compos*

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(a) 3 Adams' Rep. 91; Hagg. R. 27. See Dr. Connolly's Inq. into Insan. 384; Ray's Med. Jur. Prel. Views, § 20; 1 Pow. on Dev. by Jarman, 130, note; Shelf. on Lun. 296; Annales d'Hygiene Publique, tom. iii, p. 370.

is completely restored to the perfect enjoyment of reason on every subject upon which the mind was previously cognizant.<sup>(a)</sup> To understand whether a partial restoration to sanity is a lucid interval, we must ascertain the nature of the interval and its duration.

2112.—1. The celebrated D'Aguesseau has given a beautiful description of the *nature* of a lucid interval: he says, "It must not be a superficial tranquillity, nor a shadow of repose; *inumbrae quies*: but on the contrary a profound tranquillity, a real repose; it must not be a mere ray of reason, which only makes its absence more apparent when it is gone; not a flash of lightning, which pierces through the darkness only to render it more gloomy and dismal; not a glimmering, which unites night to the day; but a perfect light, a lively and continued lustre, a full and entire day, interposed between two separate nights, of the fury which precedes and follows it; and to use another image, it is not a deceitful and faithless stillness, which follows and forbodes a storm, but a sure and steady tranquillity for a time, a real calm, a perfect serenity. Without looking for so many metaphors to represent the idea, it must not be a mere diminution, a remission of the complaint, but a kind of temporary cure, an intermission so clearly marked, as in every respect to resemble the restoration of health."<sup>(b)</sup>

2113.—2. With regard to its *duration*, the same learned chancellor says, "As it is impossible to judge in a moment of the quality of an interval, it must be sufficiently long to give an entire certainty of the temporary reestablishment of reason; this cannot in general be defined, and it depends upon the different kinds

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(a) Shelf. on Lun. 20; Male's Elem. of Forens. Med. 227; Dr. Haslam on Madness, 46; Reid's Essay on Ment. Hypo. 317; Willis on Ment. Derangement. 151.

(b) Second Plaidoyer, sur l'affaire du Prince de Conti, Œuvres, tom. iii. p. 503, 504.

of fury; but it is certain there must be some time, and a considerable time. There is much difference between an action and an interval. An action may be wise in appearance, although the author of it may be very unwise in fact; but an interval cannot be perfect without being evidence of the soundness of the person who was before *non compos*. An action is but the rapid and momentary effect of the soul; an interval is lasting and continued. An action marks but a single act; an interval is composed of a series of actions."

2114. It is a rule that he who contends for a lucid interval must prove it; for a person once insane is presumed to be so till it be shown that he has a lucid interval, or has recovered; (a) unless, indeed, the alleged insanity was a long time before, and of a short continuance. And the wisdom of a will, where it is proved that the party framed it without assistance, is a strong presumption of the sanity of a testator. (b)

Medical men have justly doubted the existence of a lucid interval, in which the mind is completely restored to its sane state; though the law admits of such intervals, when proved, and acts done during such favored periods are considered valid. According to medical practitioners, such an interval is only an abatement of the symptoms, and not a removal of the cause of the disease; a degree of irritability of the brain remains behind, which renders the patient unable to withstand any unusual emotions, any sudden provocation, or any pressing contingency. (c)

*Art. 2.—Of incapacity arising from bodily defects.*

2115. A person deaf, dumb and blind, could not

(a) 1 Greenl. Ev. § 1; Swimb. 77; Co. Litt. Butler's note, 185.

(b) Clarke v. Cartwright, 1 Phill. R. 90; Temple v. Temple, 1 Hen. & Munf. 476.

(c) Dr. Combe, Obs. on Ment. Derangem. 241; Haslam, Med. Jur. of Ins. 224; 1 Foderé. de Méd. Lég. 205, § 140; Georget, des Malad. Ment. 46; 2 Hagg. Eccl. Rep. 433.

probably make a will, as such a person could not communicate any intention. And a person deaf and dumb, uneducated, would be in no better condition. But a person deaf and dumb, who could read and write, could doubtless make a will, although this was formerly doubted.(a)

*Art. 3.—Of incapacities arising from age.*

2116. By the Roman law, which the English law has followed in this respect, a will of chattels may be made by an infant, if a male, at the age of fourteen; if a female, at twelve. But to make a devise of land, the testator must be of full age. In the United States the rule is not uniform as to the capacity of an infant to make a will of personal estate. In some states an infant cannot make a will of personal chattels, in others he may at an age designated in the statute.

§ 2.—Of the incapacity arising because the testator is under the power of another.

2117. Some persons have sufficient mind to make a testamentary act, but they are deprived of this power in consequence of being incapable, at the time, to exert a free will, either in point of fact or in consequence of a presumption of law. Among these are married women, known technically as *femes covert*, and persons under duress.

*Art. 1.—Femes covert cannot make a will.*

2118. The state of a married woman is called *coverture*; while a woman is in this condition she has no power whatever, at common law, to make a will, strictly speaking.(b) She may, however, dispose of

(a) Vide ante, n. 374, note (c).

(b) *Osgood v. Breed*, 12 Mass. 225; *Marston v. Norton*, 5 N. H. Rep. 205; *West v. West*, 10 S. & R. 445.

her lands, when they have been conveyed to a trustee by a deed of settlement before marriage, when she is clothed with such an authority. This is not properly a will, but an appointment in the nature of a will. She may, in the same manner, devise by way of execution of a power, but this must be done with the same solemnities, as if she executed the deed while sole.(a)

In some states of the Union, a feme sole may make a will of her lands; this is the case in Connecticut,(b) Illinois, Louisiana, Mississippi, Ohio,(c) and Pennsylvania.(d)

*Art. 2.—Persons under duress are incapable of making a will.*

2119. By *duress* is meant an actual or threatened violence, or restraint of a man's person contrary to law, to compel him to do something against his will.(e) As a will or testament is to be made freely, it is evident that an instrument executed by a person while in duress is invalid and of no force whatever in law.

But although the testator may not be completely in the power of another, yet if he is under such influence as to destroy the freedom of his will, the testamentary act will be void.(f) But that kind of influence which arises from acts of kindness, attention and good conduct, will not vitiate a testament.(g)

(a) *Casson v. Dode*, 1 Bro. 99.

(b) Stat. of Conn. 1838, p. 226.

(c) *Allen v. Little*, 5 Ham. 65.

(d) Stat. of Penn. 11th April, 1848, § vii.

(e) See ante, n. 582, and post. 2161.

(f) *Mountain v. Bennett*, 1 Coxe's Cas. 355.

(g) *Miller v. Miller*, 3 S. & R. 269; 1 Hagg. 581; 2 Hagg. 142; 13 S. & R. 323; 4 Greenl. R. 220; 1 Paige, 171. This reasonable rule agrees with the civil law. *Furgole, des Testaments*, c. 5, sec. 3, n. 25. These excessive complaisances, so low, servile and contemptible, when they are the offspring of interested motives, are ennobled and become virtues, when they arise from conjugal love, filial piety, and devotedness to holy friendship. The law cannot therefore repudiate actions of which it cannot judge of the motive. 5 Toull. n. 708. See as to the degree of influence which will vitiate a last

But a suggestion made to a testator, for the purpose of procuring a devise in a particular way, when false, will amount in general to a fraud.<sup>(a)</sup> When the suggestion is true, there is nothing in it worthy of reprobation; it is only reminding the testator of something, or of some person whom he might have forgotten.

In general, a will cannot be set aside on the ground that it has been obtained because the testator was under the power of another, if there has been neither violence, fraud, nor surprise.

§ 3.—Of the time when the disability attaches.

2120. Sometimes a will is made by a person having legal capacity, who afterward becomes incapable, and who again becomes legally qualified to make a will; sometimes the will is made by a person incapable at the time, but who afterward becomes capable; at other times the testator is incapable, then he regains his health and capacity, and afterward at the time of his death he labors under a legal disability.

*Art. 1.—Effect of a devise made by a testator having capacity, who afterward became incapable.*

2121. When a devise is made by a person having capacity to make it, and the testator or testatrix, afterward becomes incapacitated, the devise will, in some cases, be good, and in others it will be void. These cases will be separately considered.

1. Such a devise is good when the incapacity arises from natural causes, as when the testator becomes

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will, *Duffield v. Morris*, 2 Harring. 375; *Chandler v. Ferris*, 1 Harring. 454; *O'Neill v. Farr*, 1 Richardson, 80; *Farr v. Thompson*, Cheves, 37; *Martin v. The Executors*, 2 Speers, 260; *Harrison v. Will*, 1 B. Munroe, 351; *Brown v. Moore*, 6 Yerg. 272; *Browne v. Molliston*, 3 Whart. 129; *Blanchard v. Nestle*, 3 Denio, 37.

(a) Bac. Ab. Wills, G 3.

insane. The insanity, which is a cause of incapacity, has no effect on the validity of the will.(a)

2. When the incapacity arises from the act of the party, the law is otherwise; as, where a woman, while sole, makes a will, and afterward she marries, the marriage will operate as a revocation, and the death of her husband will not restore the validity of the will. Nothing but a republication or reëxecution will have that effect.(b)

*Art. 2.—Of a will made during the incapacity of testator.*

2122. When a will is made while the testator labored under the incapacity of infancy, lunacy, duress, coverture and the like, it has no force whatever, and will be set aside. Having no disposing virtue, it will not become valid by the removal of the incapacity of the testator, although he may die competent to make a will, because having no legal authority at the time of making it, it has not acquired any afterward.(c) But the testator may give it life by making a republication of it, after the disability has been removed, or by a reëxecution, which is the better method.

The Roman law in this respect is in unison with the common law. When the testator is incapable at the time of making the will, although he may become capable afterward, such will is void, let the incapacity be what it may.(d)

§ 4.—Of the number of testators.

2123. Usually a will is made by a single person,

(a) Swinb. part 11, s. 3, pl. 3; 4 Co. 61 b; 1 Williams on Wills, 17.

(b) Miller v. Brown, 2 Hagg. 209; Braham v. Burchell, 3 Addams, 264. See Osgood v. Breed, 12 Mass. 525.

(c) Cruise, tit. 38, c. 2, s. 13; Dyer, 143, b; Anders. R. 182; 1 Pow. on Dev. by Jarman, 140.

(d) Inst. 2, 12, 1; Furgole des Testamens, ch. 4, n. 9; Domat, 2ème partie, liv. 3, t. 1, s. 2, n. 2.

and this appears to be the legal way of making a will. In a case, three persons, George, Martha and Susanah, made a joint will of their separate property, which was to take effect after their death. After the death of George, one of the three, Martha, one of the two survivors, made a will giving the same estate which had been bequeathed by the joint will, and then died. On a question whether the will of Martha, or the joint will should take the property, it was held the joint instrument was not a will. Sir John Nichols says, "I have no hesitation whatever in rejecting the allegation, proposing the mutual or conjoint will, as that of the party deceased in this cause, on the principle that an instrument of this nature is unknown to the testamentary law of this country; or, in other words, that it is unknown, *as a will*, to the law of this country, at all. It may, for aught I know, be valid as a compact, it may be operative in equity, to the extent of making devisees of the will trustees for performing the deceased's part of the compact." (a)

SECTION 3.—OF THE QUALITIES AND DESCRIPTION REQUISITE  
IN A DEVISEE.

§ 1.—Of the qualities requisite in a devisee.

2124. In general all persons in being at the time of making the will may be devisees; if they are capable of acquiring lands. A person insane; a feme covert; an alien, where he is competent to hold lands; and an infant, may be devisees.

The devise may also be to a child unborn. It never was questioned that a devise to an infant *in ventre sa*

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(a) *Hobson v. Blackburn*, 1 Addams, 274. See *Clayton v. Leverman*, 2 Dev. & Bat. 558. The Civil Code of Louisiana, art. 1565, declares that a testament cannot be made by the same act, by two or more persons, either for the benefit of a third person, or under the title of a reciprocal or mutual disposition.



*mère*, was valid, when the testator appeared to be aware that the devisee could not take immediately; as, in a devise to an infant *in ventre sa mère*, when he shall be born; (a) or where a testator devises that, if the child with whom his wife is now *enceinte* shall be born, it shall have a share with the rest of the children. (b)

A natural child *in ventre sa mère* may take, under certain circumstances, which will be considered under the next head.

The law has wisely restricted the right of corporations as to their being devisees. Though the English statute of charitable uses has not been reenacted in most of the states, yet it seems that a devise of a charity, not directly to a corporation, but in trust for a corporation, would be good. (c)

§ 2.—Of the description of the devisee.

2125. The devisee must be ascertained, or the devise will be void. A devise is generally given to a devisee by name, and, in such case, if the name be mistaken, it may be shown either by other parts of the will, or by evidence *aliunde*, (d) who was intended.

Devises are sometimes given to a class of individuals, as “child,” “children,” “grandchildren,” “son,” “family,” “nearest relations,” and the like. In cases of this kind, parol evidence is admissible of any extrinsic circumstances, tending to show what person or persons were intended by the testator, or to ascertain his meaning in other respects. (e)

(a) 1 Lev. 135.

(b) 2 Keb. 300.

(c) 4 Kent, Com. 507, 4th ed.

(d) *Beaumont v. Fell*, 2 P. Wms. 140; *Wigram on Wills*, pl. 184, 188; 1 Greenl. Ev. § 290; Greenl. Ev. 203. See 3 B. & A. 632 to 642; 6 T. R. 676; 1 Atk. 410; 5 Co. 68, b; 6 Ves. 42.

(e) 1 Greenl. Ev. § 288. See 2 Story, Eq. Jur. § 1071; *Jer. Eq. Jur.* 100; 1 Pow. on Dev. by Jarman, 274, note (7).

A devise to a bastard child *in ventre sa mère* is not good when the gift is made to it as the child of a certain person as its father, because, in point of law, it is uncertain who is the father. After such child is born, and has obtained a reputation of being the child of such father, a devise to it as such would be valid.(a) But a devise to an infant of whom A is *enceinte*, without any reference to the father, is good, as there can be no mistake as to the child, nor any uncertainty.(b)

SECTION 4.—OF THE THING DEVISED, AND WHAT ESTATE IS DEVISED IN THE SAME.

§ 1.—Of the thing devised.

2126. *Property* in a thing is the right to dispose of it in the most unlimited manner. The owner of property would then seem to have the most absolute power to dispose of it by his last will. But it is to be remembered, that before the proprietor can so exercise his right, he must do justice to others. Before he can be liberal, he must be just; if therefore he be indebted, his estate must be applied to the satisfaction of his just debts, before he can devise it, as a liberality to another.

With this limitation, the English law, which has been adopted in most of the states of the Union, permits a testator to devise his property. The Roman or civil law, trusting less to the dictates of nature than the English law, wisely restrained the parent from dis-inheriting his children, unless in special cases, and by virtue of the Falcidian law, set apart a fourth of the estate for the heirs, which could not be disposed of

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(a) *Metham v. Devonshire*, 1 P. Wms. 529; Co. Litt. 3, b.

(b) See *Gordon v. Gordon*, 1 Meriv. 141; *Evans v. Massey*, 8 Price, 22; *Dawson v. Dawson*, Madd. & Geld. 262; 17 Ves. 532.

by will.(a) This is the law of the state of Louisiana,(b) somewhat modified.

The practice of restricting a testator's right to devise, seems to have been the common law of England, in ancient times, and, doubtless, the rule was adopted from the Falcidian law. But by slow and imperceptible innovations the English law was altered, and the testator obtained the right to bequeath all his personal estate, without any restriction.(c)

2127. In this country the right to dispose of real estate is generally unlimited, with this exception, that the wife of the testator has her election to take under the will, or to claim her thirds or dower out of the estate. The testator may in general bequeath all his personal estate, without any restrictions. But in some states, by statute, the husband's right to dispose of his personal chattels is limited. This is the case in Pennsylvania. In Louisiana the wife has a community of interest, and her rights cannot be disposed of by the husband.

2128. As to the nature of the estate which is the subject of a devise, it may be observed that every species of estate, real or personal, corporeal or incorporeal, may be devised.(d)

2129. By the English law the testator must be seised of the lands devised, at the time of making the will. Hence it follows that an estate which the testator did not own, at the time of making his will, cannot pass, whatever words may be used. And, for the

(a) Inst. 2, 22; Dig. 35, 2; Code, 6, 50; Nov. 1 et 131.

(b) The Civil Code of Louisiana provides, "art. 1480, Donations *inter vivos*, or *mortis causa*, cannot exceed two-thirds of the property of the disposer, if he leaves at his decease a legitimate child; one-half, if he leaves two children; one-third, if he leaves three or a greater number." See also art. 1608, 1609.

(c) 2 Bl. Com. 492—494.

(d) *Jones v. Roe*. 3 T. R. 88; S. C. 1 H. Bl. 30.

same reason, a right of entry in land was held not to be devisable, the devisor having no seisin.(a)

But this rule that the testator must be seised at the time of making the will, although it may exist in some of the states of the Union, is not universal, and after-purchased lands as well as a right of entry may be devised in Connecticut, Massachusetts, New York, Pennsylvania, Virginia, and perhaps other states.

§ 2.—Of the estate devised by the will. .

2130. It is a rule that where the will gives to the heir at law, exactly the same estate which he would inherit, that the devise is void, and the heir takes the property by descent.

A devise in other cases vests in the devisee all the rights which the devisor had in the estate, subject, as has been observed, to the rights of creditors, and of his wife. But this must be understood provided that such appears to have been the intention of the devisor, for he may devise a less estate than he held, and then the devisee will take only so much as is devised to him.

SECTION 5.—OF THE FORM OF WILLS.

2131. The laws of each state have regulated the form of wills, and these must be observed, or the devise will be considered a nullity. The general doctrine is, that a will of lands is governed by the laws of the place where the land is situated; but wills of chattels are regulated by the laws of the domicile of the testator, though the personal property may be in other countries, and the will may not be executed according to their laws. *Mobilia personam sequuntur, immobilia situm.*(b) The law authorizes the testator to

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(a) See *Carter v. Thomas*, 4 Greenl. 341; *Whittemore v. Bean*, 6 N. H. Rep. 47.

(b) *Fœlix*, Dr. Intern. privé, 60—77; *Desesbats v. Berquiers*, 1 Binn. 337.

make his testament, but it is only on the condition that he complies with its regulations; if he does not fulfil the conditions, the dispositions he makes not having been authorized by law, are of course null, and without any efficacy whatever. The law requires that the testator's will shall be manifested in a particular way, and, unless it so appears, it is not manifested at all.

A will may be written in any known language, and by any one who is intrusted by the testator to write it. It is not required, as in countries on the continent of Europe, that the will should be written by, or acknowledged before, a public officer. *(a)*

The principal requisites of a will are, 1, that it be written; 2, that it be dated; 3, that it be signed; 4, that it be witnessed; 5, that it be published.

§ 1.—When a will must be in writing.

2132. No will is good to pass land unless it is in writing, and the writing be on paper or parchment, in order to prevent frauds by alterations, which could be more easily perpetrated if written on other materials. It may be written in any known characters; if, however, it should be written in hieroglyphics, it would be liable to suspicion of fraud.

It matters not as to the form, whether the instrument be in that usually adopted for a devise, or of a deed, provided it clearly appear that a will, and no more, was intended. *(b)* And the test seems to be this; whether the instrument is to take effect *wholly* after the death of the maker, or whether it is to go into operation, as to some parts at least, in his lifetime; in

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See *Dixon v. Ramsay*, 3 Cranch, 319; *De Sobry v. De Laistre*, 2 Har. & John. 224; *Haway v. Richards*, 1 Mason, 381; *Holmes v. Remsen*, 4 John. Ch. R. 460; *Harvey v. Richards*, 1 Mason, 381; *Kerr v. Moon*, 9 Wheat. 566.

*(a)* In Louisiana, wills are generally made before notaries.

*(b)* 1 Jarman on Wills, 11, 15.

the former case the instrument is considered a will, in the latter a deed.<sup>(a)</sup> Whenever the legal estate in the thing upon which the instrument operates passes at the time of its execution, it is a deed.<sup>(b)</sup>

But at the time of making the writing, the party must have a serious intention of making such will. If a man, therefore, jestingly or boastingly, and not seriously, writes or says that such a person shall have his goods or be his executor, this is no will.<sup>(c)</sup> And for the same reason a promise made in a letter, when the writer did not intend to devise, will not be effectual as a will; as, where a man living in Philadelphia, wrote a letter to his sister in Germany, desiring her to send her son to him, and added, "and if he proved obedient and followed all his directions, he should be the heir of his whole estate."<sup>(d)</sup>

§ 2.—Of the date of the will.

2133. The will ought to be dated; this is one of the principal circumstances which establish the validity of a will, or which enable the courts to detect a fraud in its execution. The fact that the testator was in a particular place at the date of the will, and that the witnesses were not there; that the will is in the hand writing of a person who was dead at the time it bears date; that it was witnessed by a person who was dead before its date; or by a person who was unknown to the alleged testator at that time; and a thousand circumstances, which may be easily imagined, will be

(a) *Allison v. Allison*, 4 Hawkes, 141, 171; *Cumming v. Cumming*, 3 Kelly, (Geo.) R. 460, 484; *Jackson v. Culpepper*, 3 Kelly, 569, 573, 574; *Hester v. Young*, 2 Kelly, 31, 46; *Atty. Gen. v. Jones*, 3 Price, 368; *Thompson v. Brown*, 3 My. & K. 32.

(b) 4 Hawkes, 171; 3 Kelly, 484. See *Hamilton v. Pease*, 2 Desaus. 92.

(c) *Bac. Ab. Wills*; *O. Com. Dig. Estates by Devise*, D 1. See 4 S. & R. 545; 3 Yeates, 324; 5 Binn. 490.

(d) *Stein v. North*, 3 Yeates, 324.

evidence to prove the will to be genuine or otherwise. Again, where there are two papers, both purporting to be wills, if without date, it may be difficult to prove which is the last.

But it not unfrequently happens that there are circumstances mentioned in the will which corroborate or disprove the date; for example, where a testator gives lands to an individual and describes him as a member of congress, or governor of the state, and the individual at the date was such, this will be a circumstance to establish it; but should the devisee at the time never have been a member of congress or governor of the state, it would be a suspicious circumstance against it.

2134. An error in the date, however, would not vitiate the instrument where every thing else was fair, particularly if in the will itself there should be material or physical elements which would correct, verify and fix it necessarily. For example, if a will should be dated the fourth of July "*one thousand eight hundred;*" these words being printed and a blank left to write other words; and in that will there should be a bequest to James K. Polk, "now president of the United States," it is evident that the date might be corrected by the fact that James K. Polk was not president till the year 1844; or if the testator should state his age to be thirty years at the date of the will, and he was born in the year 1815, then the will must have been made in eighteen hundred and forty-five, and these latter words would be supplied, to correct the error.

§ 3.—Of the signature of the will.

2135. It has been observed that a will concerning lands must be executed according to the laws of the place where the lands are situated.(a) By the English

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(a) *Kerr v. Moon*, 9 Wheat. 566.

statute of frauds, which has been adopted in substance with some modifications in those states where their code is based on the common law, such will must be signed by the testator.

A *signature* is the act of putting down a man's name at the end of an instrument, to attest its validity. The name thus written down is also called a signature. One would have scarcely supposed that when a statute required that a will should have the signature of the testator, the courts should have decided, as they did, that a testator who commenced a will with these words: "I, A B, make this my will," it would have been considered a sufficient signing.<sup>(a)</sup> In this country the general rule is that a will must be signed at the end, in order to give it validity; but the rule is not universal.<sup>(b)</sup>

In Vermont, beside a signature, the will requires a seal.

§ 4.—Of the attestation of the will.

2136. The English statute of frauds, already mentioned, not only requires that the will shall be signed by the testator, but that it shall be attested by witnesses. This provision prevails in many of the states, and three witnesses are required to attest the will; this is the case in Alabama, Connecticut, Georgia, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, Rhode Island, South Carolina, and Vermont: two witnesses only are required in Delaware, Illinois, Indiana, Kentucky, Missouri, North Carolina, New York, Ohio, Tennessee, and Virginia. In Pennsylvania a will of lands in writing is good, without any subscribing witnesses; but, in that case, the hand writing must be proved by two witnesses.

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(a) *Lemayne v. Stanley*, 3 Lev. 1. See *Sarah Miles' will*, 4 Dana, 1.

(b) 4 Dana, 1.



The civil code of Louisiana requires at least three witnesses to a nuncupative testament under private signature,<sup>(a)</sup> and four to a mystic testament,<sup>(b)</sup> and these witnesses must not be such as are forbidden by the code, namely, women of whatever age; male children who have not attained the age of sixteen years complete; persons insane, deaf, dumb or blind; persons whom the criminal law declares incapable of exercising civil functions, and slaves.<sup>(c)</sup>

By the English statute of frauds, the will is to be signed by the testator, and attested and subscribed by the witnesses in his presence. The construction put upon this statute by the English courts is, that there may be a constructive presence. It has been decided that if the witnesses were in view, and where the testator had, or might have seen them, with some little effort, they were to be deemed in his presence.<sup>(d)</sup> It was also held, that if the will was signed by the testator, in the absence of the witnesses, and produced by him, it was not necessary it should be actually signed in their presence.<sup>(e)</sup> The testator must have a capacity to know that the witnesses were present; if, therefore, he was in an insensible state, or asleep, he would not be considered as being present;<sup>(f)</sup> and with this very reasonable rule agrees the civil law. By that law, he who is considered incapable of giving his consent to an act, is not to be considered as present, although he is in the same place; a lunatic, or a man sleeping, would therefore not be considered present.<sup>(g)</sup>

§ 5.—Of the publication of a will.

2137. In its most usual signification, the word *publi-*

(a) Art. 1641.

(b) Art. 1643.

(c) Art. 1584.

(d) *Mason v. Harrison*, 5 Harr. & John. 480.

(e) *Bond v. Seawell*, 3 Burr. 1773.

(f) *Right v. Price*, Doug. 241.

(g) Dig. 41, 2, 1, 3.

*cation* means the act by which a thing is made public; but when spoken of a will, it signifies that the testator has done some act from which it can be concluded that he intended the instrument to operate as a will.(a)

This publication is either express or implied. It is express, when the testator declares before witnesses that he publishes the paper as his will. It is implied from any acts of his which manifest an intention that the will shall have effect.(b) The words signed and published by A B "as for his last will," are a sufficient publication: and a delivery of a paper as a deed, will also be sufficient.(c)

2138. But the law on the subject of publication of wills is not uniform in all the states; in New Jersey the statute of wills requires that such an instrument shall be published in the presence of the witnesses, either wholly by the testator, or by the scrivener or other agents asking questions, or the testator expressing his assent by words or signs which plainly indicate his understanding of, and acquiescence in, such publication.(d)

#### SECTION 6.—OF THE KINDS OF WILLS.

2139. Independently of wills being in writing, and not in writing, they are subject to other divisions.

##### § 1.—Of nuncupative wills.

2140. A *nuncupative will* is a verbal declaration, solemnly made before a competent number of lawful

(a) Cruise, Dig. t. 38, c. 5, s. 47; 4 Greenl. 220; Com. Dig. Estates by Devise, (E. 2.) It is not necessary to prove that the will was read to him, or that he had read it himself. Having executed it, he will be presumed to know its contents. Shanks v. Christopher, 3 Marsh. (Ky.) Rep. 145.

(b) Wallis v. Wallis, 4 Burn's Eccl. Law, 114.

(c) Trimmer v. Jackson, 4 Burn's Eccl. Law, 117. See Ross v. Ewer, 3 Atk. 161; Peat v. Ongly, 1 Com. R. 196; Small v. Small, 4 Greenl. 220; Barnet's Appeal, 3 Rawle, 15; Ray v. Walton, 2 A. K. Marsh. 71; Bagwell v. Elliott, 2 Rand. 199; Loy v. Kennedy, 1 Watts & Serg. 396.

(d) Den v. Milton, 4 Halst. 70.

witnesses by a testator, of what his will is respecting his estate.

A will of goods and chattels could be made at common law without writing. But being liable to great abuse and perjury, the statute of frauds, 29 Car. II., c. 3, was passed. It enacts "that no nuncupative will shall be good, when the estate bequeathed exceeds in value thirty pounds, unless proved by three witnesses present at the making thereof, and who shall be specially required to bear witness to it; nor unless it was made in the testator's last sickness, in his own dwelling house, or where he had been previously resident ten days at the least, except becoming sick from home, and dying without returning, and reduced to writing within six days after the testator's death, and not proved till fourteen days after his death, and the widow or next of kin has been summoned to contest it."

These provisions of the statute have been generally reenacted in this country, but as they were found inefficient to prevent frauds and perjuries, nuncupative wills have been abolished in several states.<sup>(a)</sup>

2141. In Louisiana, the name of nuncupative or open testament is given to one made under private signature, written by the testator himself, or by any other person from his dictation; or even by one of the witnesses residing in the place where the will is received, or of seven witnesses out of that place.<sup>(b)</sup> But these formalities are varied under certain circumstances. These nuncupative wills are distinguished from two other kinds, used in that state, namely the mystic or sealed testaments, and olographic testaments.

It is proper to observe that in Louisiana these nuncupative testaments are of two kinds, one by public act, received by a notary public, in the presence of

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<sup>(a)</sup> Civil Code of Louisiana, art. 1569; 2 Revised Stat. of New York, 60.

<sup>(b)</sup> Civ. Code, art. 1574.

three witnesses residing in the place where the will is executed, or of five, not residing in that place; the other under private signature as above mentioned.

§ 2.—Of mystic wills or testaments.

2142. In Louisiana, there is a form of testament, derived from the civil law, called a *mystic* or *secret testament*, otherwise called the closed testament. It is a form of making a will, which principally consists in inclosing it in an envelop, and sealing it in the presence of witnesses.

The code prescribes that such testaments shall be made in the following manner: The testator must sign his dispositions, whether he has written them himself, or caused them to be written by another person. The paper containing those dispositions, or the paper serving as their envelop, must be closed and sealed. The testator shall present it, thus closed and sealed, to the notary and to seven witnesses, or he shall cause it to be closed and sealed in their presence. Then he shall declare to the notary, in the presence of the witnesses, that that paper contains his testament, written by himself, or by another by his direction, and signed by him, the testator. The notary shall then draw up the act of superscription, which shall be written on that paper or on the sheet that serves as its envelop, and that act shall be signed by the testator, and by the notary and the witnesses.(a)

All that is above prescribed shall be done without interruption or turning aside to other acts; and in case the testator, by reason of any hindrance that has happened since the signing of the testament, cannot sign the act of superscription, mention shall be made of the declaration made by him thereof, without its being necessary, in that case, to increase the number of witnesses.(b)

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(a) Art. 1577.

(b) Art. 1578.

Those who do not know how, or are not able to write, and those who know not how or are not able to sign their names, cannot make dispositions in the form of the mystic will.(a)

If any one of the witnesses to the act of superscription knows not how to sign, express mention shall be made thereof. In all cases the act must be signed by at least two witnesses.(b)

§ 3.—Of olographic testaments.

2143. The term *olographic testament* is derived from the civil law. An olographic testament is one wholly written by the testator himself. This kind of testament is common in Louisiana. In order to be valid it must be entirely written, dated and signed by the hand of the testator. It is subject to no other form, and it may be made any where, even out of the state.(c)

Such a will is perfectly good in Pennsylvania to pass real or personal estate, when the hand writing of the testator is proved by two witnesses.(d)

§ 4.—Of codicils.

2144. A *codicil* is an addition or supplement to a will; it must be executed with the same solemnities. A codicil is a part of the will, the two instruments making but one testament.(e)

This instrument, like most of the law relating to the manner of making and executing wills, is derived from the Roman law. This law required that a regular will should be attested by seven Roman

(a) Art. 1579.

(b) Art. 1580.

(c) Art. 1581.

(d) *Arndt v. Arndt*, 1 S. & R. 256; *Barnet's Appeal*, 3 Rawle, 21.

(e) *Sherer v. Bishop*, 4 Bro. C. C. 55; *Fuller v. Hooper*, 2 Ves. 242; 4 Ves. jr. 610; 2 Ridgw. R. 11, 43.

citizens, *omni exceptione majores*. A legacy could be bequeathed, but the heir could not be appointed by codicil, though he might be made heir indirectly by way of *fidei commissum*, or trust.

Codicils were chiefly intended to mitigate the strictness of the ancient Roman law. They owe their origin to the following circumstances: Lucius Lentulus, dying in Africa, left codicils, confirmed by anticipation by will of former date, and in those codicils requested the emperor Augustus, by way of *fidei commissum*, or trust, to do something therein expressed. The emperor carried this will into effect, and the daughter of Lentulus paid legacies which she would not otherwise have been legally bound to pay. Other persons made similar *fidei commissa*, and then the emperor, by advice of learned men whom he consulted, sanctioned the making of codicils, and thus they became clothed with legal authority. (a)

2145. Following the civil law, formerly the difference between a will and a codicil consisted in this, that in the former an executor was named, while in the latter none was appointed; but that difference does not now exist, a will does not lose any of its efficacy, because no executor is appointed. An estate devised by such will would equally pass to the devisee, as if an executor had been named; and the title to the personal estate would be vested in the administrator with the will annexed, who would be bound to pay legacies as if he had been appointed executor.

There may be several codicils to one will, and the original instrument and all the codicils may make but one will. The will is the disposition and desire of the testator, the testament and the codicils are only the instruments which contain such will. (b)

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(a) Inst. 2, 25; Bowy. Com. 155, 156.

(b) 2 Ves. 242; Beall v. Cunningham, 3 B. Munroe, 390; Pollock v. Glassell, 2 Gratt. 439; Chambers v. McDaniel, 6 Iredell, 226.

The principal difference now existing between a testament and a codicil is, that the former is made first, that the latter is intended to modify or change some provisions in the testament. The codicil does not necessarily revoke the testament otherwise than as its particular dispositions show.(a)

SECTION 7.—OF THE REVOCATION OF WILLS, AND HOW THEY BECOME NULL.

2146. The testator has at all times, during his life, the power of changing his mind as to his property, and he may dispose of it at any time as he pleases,(b) it being a maxim that the *first deed* and the *last will* have alone any efficacy. The testator may therefore make a second will and by that revoke the first, and again revoke the latter, and so on at his pleasure. And he can never deprive himself of the right of devising or restrain himself from using the full liberty of making his will: *Nemo potest sibi testamento eam legem dicere non liceat.*(c)

2147. When the testator has not made use of the faculty which he had of revoking his will, he is considered as having continued in the same mind until the time of his death. But an exception has been made to this general rule, that when a will is made for a temporary purpose, it is conditional, and may be presumed to be revoked when that purpose is answered.

An individual in search of health, when about leaving home, made a testament which began as follows: "My wish, desire, and intention now is, that if I should not return, (which I will, no preventing Providence,) what I own shall be divided as follows," etc. And then he disposes of his property with

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(a) 8 Cowen, 56.

(b) Forse and Hembling's case, 4 Co. 61, b.

(c) Dig. 17, 2, 52, 9; Vinyor's case, 8 Co. 81, b.

reference to his family, as it then existed, and to a probable alteration in it arising from the supposed pregnancy of his wife: he died about a month after he returned home: it was held that the disposal was subject to the condition of his dying away from home, and therefore that the paper ought not to be admitted to probate.(a)

2148. A *revocation* is the act by which a person having authority, calls back, or annuls a power, gift, or benefit, which had been bestowed upon another.

Wills may become null by the act of the testator himself; by the act of law; by facts which have happened since they were made, which prevent their execution; and for want of the formalities required by law, or for other causes. This section will therefore naturally divide itself into four heads.

§ 1.—Of revocations by the act of the testator.

2149. The revocation of wills may take place by the act of the testator, which is either express or implied, general or special.

It is *express*, when the testator has formally declared in writing that he revokes his will, or that he revokes certain legacies or certain particular dispositions.

*Implied*, when it arises from some other disposition of the testator, or from a fact which supposes a change of his will.

It is *general*, when the whole will is revoked.

*Special*, when it affects only some of its dispositions, leaving the others untouched.

*Art. 1.—Of express revocation.*

2150. The first question to be considered is, in what form is the revocation to be made? If we followed simply our reason, we should imagine that the

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(a) Todd's will, 2 W. & S. 145. See *Tarver v. Tarver*, 9 Pet. 174.



testament deriving all its force from the will of the testator, the revocation ought to take place, whenever a change of his will was made manifest, not by equivocal acts, but by those which are received as evidence of facts in courts of justice. But to prevent the admission of loose testimony, which might not unfrequently lead to perjury, the English statute of frauds, in imitation of the Roman law,<sup>(a)</sup> required that the same formalities should be used in revoking a will, by a subsequent one, as were required to establish it. This is the general rule in the United States.<sup>(b)</sup>

*Art. 2.—Of implied revocation.*

2151. By an *implied* revocation is meant that which results from the acts or dispositions of the testator which indicate, or suppose on his part, a change of his will. Let us first examine the implied revocation which arises from posterior testamentary dispositions; secondly, the revocation which is effected by the sale or other appropriation of the property given; thirdly, by the loss of the thing given; fourthly, by the destruction of the will.

*1. Of the revocation which arises from a posterior testamentary disposition.*

2152. We have seen that a testator may make several wills and codicils, and that when they are not inconsistent with each other, they are all as but one will. But when there is an incompatibility between them, the last shall prevail; but still when they are not incompatible they shall all stand.

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(a) A will at Rome was considered as a law, which derogated, in the particular case, from the intestate law, the latter of which obtained its force only when there was no will. And as it required the same form to repeal a law, as to make one, the same rule was applied to a testament. Ricard, des Donations, partie, 3, n. 121.

(b) Reid v. Borland, 14 Mass. 208; Laughton v. Atkins, 1 Pick. 535; Lewis v. Lewis, 2 W. & S. 455; Deakins v. Hollis, 7 Gill & John. 311; but see Clark v. Ehorn, 2 Murph. 235.

For example, if, after having devised my house in Philadelphia to Titius, by another will, I make a variety of dispositions without revoking the former will, and say nothing of my house nor about Titius, the first will shall stand as it regards the devise to Titius; but if, on the contrary, by a codicil, I give the same house to Mevius, the devise to Titius is revoked, although there is no express revocation. But in this latter case it must be clear that the two devises cannot stand, and that one or the other must be void; and also that the testator did not intend both devisees to take as tenants in common.(a)

2. *Of a revocation by a sale or other disposition of the property devised.*

2153. Every *alienation*, however made, of the property devised, revokes the will *pro tanto*, but if any part of the thing devised remains, the devise shall be good for that; for example, if a testator devise his farm containing one hundred acres of land to his son John, and afterward he sell ten acres of it, the devise to John shall be good for what he owned at the time of his death; if, on the contrary, he had sold the whole, the devise to John would have failed.

2154. In Pennsylvania and New York it has been holden that a sale of a lot in fee, reserving a ground rent out of it, so changed the property that the devisee was not entitled to any thing.(b) Indeed the same principle seems to have been established in various cases. It has been holden that where a testator parted with the estate, by making a conveyance of it, and then took it back by the same instrument, or by a declaration of uses, it operated as a revocation, because he once parted with the estate; for either an intention

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(a) See *Brant v. Wilson*, 8 Cowen, 56.

(b) *Skerrett v. Burd*, 1 Whar. 246; *Harrington v. Budd*, 5 Denio, 321.

to revoke, or an alteration of the estate without such intention, will operate a revocation.(a)

2155. For the same reason, when the testator dies indebted so that all his property has to be applied to the payment of his debts, it is evident that his will is annulled, because there is no property on which it is to act; but this must be understood as applying only to the devisees or legatees, for the will retains its full force as regards the executors who are to administer the assets, and pay the debts to their full extent.

### 3. Of revocation by the loss of the thing given.

2156. When a thing is specifically given by will, and, by any accident, it is *lost or destroyed*, the will is revoked *pro tanto*. If a man bequeath to his son his horse Bucephalus, and also one hundred dollars in cash, if the horse shall die, the legatee will have no claim on the executor for another horse, as he would if the bequest had been simply of a horse, without designating any particular animal; and the legatee will be entitled only to one hundred dollars.

### 4. Of revocation by the destruction of the will.

2157. Another mode of revoking a will is by *burning, cancelling, tearing or obliterating* the instrument, *animo revocandi*, for if it be destroyed merely by accident, without any intention to revoke it, the contents of it may be proved.(b) But the slightest cancelling, *animo revocandi*, will operate as a cancellation and revocation of the will.(c)

The presumption of law is, that the tearing and destruction are done *animo revocandi*; the presumption

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(a) *Dister v. Dister*, 3 Lev. 108; *Darley v. Darley*, 3 Wils. 6; *Goodtitle v. Otway*, 1 B. & P. 576; 7 T. R. 399. See 4 Kent, Com. 529, 530, 4th ed.; Pow. on Dev. 565 to 570.

(b) *Jackson v. Holloway*, 7 John. 394; *Dan v. Bowen*, 4 Cowen, 483.

(c) 4 Cowen, 483.

may be repelled, however, by showing the *animus* did not exist. A rule has been established in relation to dependent relative revocations, in which the act of cancelling being done with reference to another act, meant to be an effectual disposition, will or will not, according to the relative act, be efficient or inefficacious; (a) as where a man made a second will, to the use of the same persons to whom he had devised the land by the first will, with a variation only in the name of one of the trustees; but which second will was not good, because not duly attested according to the statute of frauds. After so executing the second will, he cancelled the first by tearing off the seal; one question was whether the cancelling of the former will was a revocation thereof within the statute of frauds, and it was held it was not. (b)

§ 2.—Of revocation by act of law, or lapse and ademption.

2158. A will is *lapsed* or revoked *pro tanto* by the death of the devisee before that of the testator, or before the condition upon which the devise or bequest has been made has been performed, or before the time when the estate has been directed to vest has arrived. (c)

2159. In Connecticut, Maine, Maryland, Massachusetts, Pennsylvania, Rhode Island, New York, and probably other states, if the devisee or legatee dies in the lifetime of the testator, his lineal descendants are entitled to his share, unless the will anticipates and provides for the case. (d)

2160. A distinction has been made between a lapsed devise of real estate and a lapsed legacy of personal

(a) Pow. on Dev. by Jarman, 600.

(b) *Onions v. Tyrer*, 2 Vern. 742; S. O. Prec. in Chan. 459; 1 Saund. 279, c; Pow. on Dev. 600; Ex parte Ilchester, 7 Ves. 379.

(c) Bac. Ab. Legacy, E; Com. Dig. Chancery, 3 Y. 13; Lownd. on Leg. 408 to 415; 1 Roper on Leg. 319 to 341.

(d) 4 Kent, Com. 526, 4th ed.

estate. The real estate which is lapsed does not fall into the residue, unless so provided by the will, but descends to the heir at law, as if it had never been devised; on the contrary, lapsed personal property passes by the residuary clause where it is not otherwise disposed of.<sup>(a)</sup> The reason assigned for this difference is, that a bequest of personal property refers to the state of the property at the time of the death of the testator, and that a devise operates only on land of which the testator was seised when he made his will; and it is not to be presumed he intended to devise by a residuary clause, a contingency which he could not have foreseen, nor to embrace in it lands contained in a lapsed legacy.<sup>(b)</sup> How far the alteration of the law of those states when after-acquired lands may be devised, will destroy this distinction, it is difficult to say.

2161. A legacy is adeemed when it is taken away by the testator, expressly or by implication; as, for example, when a father makes a provision for a child by his will, and afterward gives to such child, if a daughter, a portion in marriage; or if a son, a sum to establish him in life, provided such portion or sum of money be equal or greater than the legacy.<sup>(c)</sup>

§ 3.—Of revocation by facts which have happened since making the will, as marriage and birth of a child.

2162. A rule founded in justice and the natural affections has been established, that a marriage and birth of a child, after the testator made his will, is a revocation of it, provided the wife and child are unprovided for, and the whole estate has been disposed

(a) Woolmer's Estate, 3 Whart. 477; Brown v. Higgs, 15 Ves. 709; Leake v. Robinson, 2 Mer. 393.

(b) Gore v. Stevens, 1 Dana, 207; Doe v. Underdown, Willes, 293; Green v. Dennis, 6 Conn. 292; Ligan v. Carrol, 3 Har. & McH. 333.

(c) Fonbl. Eq. 368 et seq.; 1 Vern. by Raithby, 85, n.

of to their exclusion. This operates as well on real as personal property.

In England, this rule is said to have been of modern origin,<sup>(a)</sup> but it seems to be firmly established. By the civil law the birth of a posthumous child was an implied revocation of a will.<sup>(b)</sup> In this country we have numerous statute regulations on the subject, and generally, when a man marries or when a child is born after he makes his will, he is considered as dying intestate, as to the wife he may have thus taken, and the children so born; though in some of them, the birth of a child, after making the will, is no implied revocation. In some of them such circumstances operate as a total revocation, in others, a revocation *pro tanto*.

The will of a woman who afterward marries, we have seen, is revoked by the marriage, because the marriage does not leave the wife free to alter it; and it is against the nature of a will to be absolute during the testator's lifetime.

§ 4.—Of annulling testaments and of their rescission.

2163. A testament may be annulled if the forms prescribed by law for its validity have not been observed. It may also be declared null if the testator or devisee were incapable, one to devise and the other to take; what these incapacities are, has already been explained. And the defects or vices which are sufficient to cause contracts to be annulled, are, *a fortiori*, sufficient to cause a testament to be avoided, which ought to emanate from the will of the testator, and which, too often, is made when the testator is most easily surprised, and induced to make a will which freely he would not have made.

(a) 1 Williams on Wills, 105.

(b) Inst. 2, 13, 1.

The principal causes for annulling a will formally made, are fear or duress, and fraud.

*Art. 1.—Of fear or duress.*

2164. *Duress* has already been defined, (a) and here it is only necessary to state its effect. When it can be shown that force has been used to compel a testator to make a will, it cannot be doubted that although all the formalities required by law have been complied with, and the party was perfectly in his senses at the time of making the will, yet it can never stand. (b) But less violence than that will be sufficient to destroy the efficacy of a will; if, at the time of bequeathing, the testator has any just fear of injury, he could not enjoy that freedom which the law requires he should possess. It must, however, be understood, that it is not every fear, or a vain fear, that will have the effect of annulling the will; but a just fear, without which the testator would not have made the will as he did. (c)

*Art. 2.—Of frauds.*

2165. Fraud, which annuls every thing, will of course render a testament void, although it may be clothed with all the forms; and, indeed, more care is taken to be particularly formal when there is fraud.

But we have seen that using influence over a testator, by suggesting to him what he ought to do, may or may not be fraudulent; when used for a fraudulent purpose, they avoid a will. (d) The sort of influence which will invalidate a will is thus described by a learned judge: (e) "There is another ground, which, though not so distinct as actual force, nor so easy to

(a) Ante, n. 582.

(b) *Mountain v. Bennett*, 1 Cox, 355.

(c) *Godolph*, part 3. c. 25, s. 8; 5 *Toull.* n. 704.

(d) Ante, n. 2115.

(e) *Eyre*, O. B., in *Mountain v. Bennett*, 1 Cox, 355.

be proved, yet if it should be made out, would certainly destroy the will; that is, if a dominion was acquired by any person over a mind of sufficient sanity for general purposes, and of sufficient soundness and discretion to regulate his affairs in general; yet if such dominion or influence were acquired over him as to prevent the exercise of such discretion, it would be equally inconsistent with the idea of a disposing mind.”(a)

#### SECTION 8.—OF THE REPUBLICATION OF WILLS.

2166. By *republication* is meant an act done by a testator, from which it can be concluded that he intended an instrument which had been revoked by him, should operate as his will; or it is the reëxecution of a will by the testator, with a view of giving it full force and effect.

##### § 1.—How a republication is to be made.

2167. A republication may be made in various ways: by a reëxecution of the will, that is, signing it and causing the witnesses to sign it; but it has been decided that the mere declaration of the testator that he republished his will, and causing the witnesses to subscribe their names to it as witnesses, is sufficient, though it is not then signed by the testator.(b) And in Pennsylvania, where a will need not be attested by witnesses, but proved by evidence of the hand writing of the testator, the republication may be by parol, but such republication must be proved by two witnesses, as in the case of an original publication.(c)

A will may also be republished by a codicil which refers to it; as, “I hereby ratify and confirm my said

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(a) See *Miller v. Miller*, 3 S. & R. 267; *Small v. Small*, 4 Greenl. 220.

(b) *Reynolds v. Shirley*, 7 Ham. (part 2), 39.

(c) *Jones v. Hartley*, 2 Whart. 103; *Musser v. Gurry*, 3 Wash. C. C. 481.



will, except in the alterations after mentioned;”(a) and although the reference may be imperfect, if the inaccuracy is not such as to prevent the certainty of the will, such imperfection will not be fatal.(b) When a reference is made to a will, if no express date is mentioned, the codicil will be presumed to refer to the last.(c)

The republication must be made *animo republicandi* by the testator; for example, when the testator was in search of another paper, and a person who was assisting him took up the will by mistake, whereupon the testator said, “that is my will;” this was held not to amount to a republication.(d)

§ 2.—Of the consequences of a republication.

2168. A republication of a will establishes it fully, as if it had never been revoked, and, indeed, it gives greater efficacy, for when it disposes of all the testator’s lands, it will carry all after-purchased lands, of which the testator was seised at the time of the republication.(e)

And upon the same principle, if one give to Sarah, his wife, a piece of plate, or other thing, and at that time he has no wife, but afterward he marries one of that name, and then republishes this will, the wife will be entitled to the bequest. Again, if a testator devise the horse which he owns to the legatee, and at the time of making the will he had no horse, but, afterward bought one and then republished his will, the legatee would be entitled to the horse.(f) In these cases the republication is the same as making a new

(a) Com. R. 381.

(b) *Rogers v. Pettis*, 1 Addams, 38.

(c) *Crosbie v. MacDoual*, 4 Ves. 615.

(d) *Abney v. Miller*, 2 Atk. 599. See *Burns v. Burns*, 4 S. & R. 295.

(e) *Luce v. Dimock*, 1 Root, 82; *Jackson v. Holloway*, 7 John. 394; *Parker v. Cole*, 2 J. J. Marsh, 503; *Girard v. Mayor*, 4 Rawle, 323.

(f) Off. Ex. c. 1, p. 62.

will and its effect is to extend to subjects which have arisen between its date and republication.

The republication of it, makes a will speak as if it were made at the time of republication. In fact, it makes it a new will; and upon the principle that the last is the best, the will republished is to be considered as the *last*, although there may then exist several of a later date.(a) But there is a marked distinction between wills and codicils in this respect; for as every codicil, in construction of law, is a part of the will, a testator by expressly referring to, and confirming the will, is not to consider it as intending to set it up against a codicil or codicils, revoking it in part.(b)

#### SECTION 9.—OF EXECUTORS.

2169. When a will is made, and a person is appointed to manage the estate of the testator, such a person is called an *executor*, *executor testamentarius*. When no such person is appointed by the will, or when no will is made, a person is appointed by a civil officer, known by different names in the several states, to administer, manage and settle the estate of the deceased, who is called an *administrator*.(c) Though their powers are generally similar, yet they differ in some respects.

In discussing this subject we will inquire into, 1, the appointment of executors; 2, the capacity of persons to serve as executors; 3, the kinds of executors; 4, their number; 5, of the interest of the executors; 6, of their powers and duties; 7, of their liabilities.

##### § 1.—Of the appointment of executors.

2170. The executor is appointed by the will, by an

(a) *Serocold v. Hemming*, 2 Cas. temp. Lee, 490; 1 Addams, 38.

(b) *Crosbie v. MacDonal*, 4 Ves. 610.

(c) The rights, powers, and duties of administrators have been considered when treating of the title derived from intestacy. Book 2, part 1. tit. 7, c. 2, n. 1544.

express clause to that effect, but although that is usual, it is not indispensably necessary, for he may be so appointed by construction, and then he is called an executor *according to the tenor*; as when the testator by circumlocution recommends or commits to one or more the charge and office, or other rights which appertain to an executor, it amounts to as much as constituting him or them to be executors. The following are examples, where the testator said, "I appoint my nephew my residuary legatee, to discharge all lawful demands against my will."<sup>(a)</sup> "I make A B lord of all my goods,"<sup>(b)</sup> "I make my wife lady of all my goods."<sup>(c)</sup>

§ 2.—Who may be an executor.

2171. In general, all persons qualified to make wills may be executors, and some others beside. A feme covert and an infant may be executors, although they are unable to make a will. An alien friend may be an executor, though it may be doubted whether an alien enemy, while he continues such, can act in that capacity.<sup>(d)</sup>

But it is to be observed that when a wife is appointed executrix, the consent of the husband, express or implied, must be had, because when he dissents, she cannot act, for this good reason, that he would be liable for her devastavit. On the other hand, she cannot be compelled to act although the husband consents.

Perhaps few or no persons are disqualified from acting as executors on account of their crimes; unless they become, in consequence of a judicial sentence, civilly dead. In England, where outlawry is allowed,

(a) *Grant v. Leslie*, 3 Phillim. 116.

(b) *Godolph.* part 2, c. 5, s. 3.

(c) *Swinb.* part 4, s. 4, pl. 3.

(d) *Bac. Ab. Executors*, A 4.

an outlaw may sue as executor, because he sues in *outr droit*.

Whether a corporation could be an executor, seems to have been doubted; but in some states such bodies are authorized, at least in certain cases, to act as executors, by legislative provisions.

§ 3.—Of the several kinds of executors.

2172. Executors, considered as to the extent of their authority, are general and absolute, or limited and qualified; as to the nature of their appointment, they are instituted or substituted; as to the lawfulness of their appointment, they are rightful executors, or executors *de son (leur) tort*.

Art. 1.—Of the extent of the authority of executors.

2173.—1. An executor is *general* and *absolute* when he is constituted certainly, immediately, and without restriction in regard to the testator's effects, or limitation in point of time.

2174.—2. The appointment of an executor may be limited or qualified, or it may be conditional. The qualifications and limitations may be classed as follows:

1. The appointment may be limited in point of *time*, for the time may be limited when the person appointed shall begin to exercise his rights, or when he shall cease to be executor; as, if the executor be appointed to act until the testator's children shall attain the age of twenty-one years.(a)

2. It may be limited in point of *place*; as if one be appointed executor of the testator's goods in Pennsylvania.

3. The power of the executor may be limited as to the *subject matter* upon which it is to be exercised; as

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(a) Swinb. part 4, s. 17, pl. 4.

when a testator appoints A the executor of his goods and chattels in possession of B, or of all his choses in action. One may be appointed executor of one thing only.(a) But although a testator may thus appoint separate executors, of distinct parts of his property, and may divide their authority, yet *quoad* creditors of the testator they are all executors, and as one executor, and may, therefore, be sued jointly as one executor.(b)

4. The appointment may be conditional, and the condition may be either precedent or subsequent.(c)

*Art. 2.—Of instituted and substituted executors.*

2175.—1. An *instituted* executor is one appointed by the testator without any condition, and who has the first right of acting, when there are substituted executors. An example will show the difference between an instituted and a substituted executor: suppose a man makes his son his executor, but if he will not act, he appoints his brother; and, if neither will act, his cousin. Here the son is the instituted executor in the first degree, the brother is said to be substituted in the second degree, and the cousin in the third degree, and so on.(d)

2176.—2. A *substituted* executor, is one appointed executor, if another person, who has been appointed, refuses to act.

*Art. 3.—Of rightful executors, and executors in their own wrong.*

2177.—1. A *rightful* executor is one lawfully appointed by the testator in his will. Deriving his authority from the will, he may do most acts which pertain to his office, before he obtains letters testamentary;

(a) Off. Ex. 29; 3 Phillim, 424.

(b) Cro. Car. 293.

(c) Godolph. part 2, c. 2, s. 1; Off. Ex. 23.

(d) Swinb. part 4, s. 19, pl. 1.

he may collect debts, give acquittances, sell the personal property, and perform all similar acts, but he must obtain such letters before he can declare in an action brought by him as such; for in his declaration, he must make profert of his letters testamentary.(a) But it is to be observed that when he sues for goods which were in his actual possession, he need not make profert.

2178.—2. An executor *in his own wrong, de son tort*, is one who, without lawful authority, undertakes to act as executor of a person deceased. He is in general held responsible for all his acts, when he does anything which might prejudice the estate, and receives no advantage whatever in consequence of his assuming the office. He cannot sue a debtor of the estate, but may be sued generally as executor.

A very slight circumstance will render a man executor *de son tort*. It has been held that taking a Bible or a bedstead were sufficient indicia of the person so interfering being the representative of the deceased.(b) And if he receives a debt due to the deceased, or gives an acquittance for it, or declares in an action, or pleads to it as executor, without lawful authority, when there is no rightful executor or administrator, he will be considered as executor *de son tort*.(c)

But when there is a rightful executor or administrator, there can be no executor *de son tort*, for the acts which could render a man such, make him a trespasser.(d)

The doctrine relating to executors in their own

(a) 1 Williams on Ex. 175. In Alabama, and perhaps some other states, an executor has no power to act until he takes out letters testamentary. *Cleveland v. Chandler*, 3 Stew. 489; *Tucker v. Starks*, Brayt. 99.

(b) Toll. Ex. 38; *Robbins' case*, Noy, 69. See *Godolph. part 2, c. 8, s. 1*; *Swinb. part 4, s. 23*.

(c) Com. Dig. Administrator, (C. 1).

(d) Will. on Ex. 151.

wrong, applies only to chattels, for a man cannot be executor *de son tort* of lands.(a)

§ 4.—Of the number of executors.

2179. Only one executor may be appointed, or there may be any number that the testator may please to appoint. The questions which arise in regard to executors, are, 1, what interest they have in the estate of the testator; 2, how far they are liable for each other's acts; 3, what are the rights of the survivor.

*Art. 1.—Of the interest of joint executors in the estate of the testator.*

2180. Joint executors are considered as but one person, representing the testator, and, therefore, the acts of any one of them which relate either to the delivery, gift, sale, payment, possession or release of the testator's goods, are deemed, as regards the person with whom they contract, the acts of all.(b)

But the right is confined to such acts, and an executor has no power to confess a judgment, without the knowledge or consent of his coexecutor, for a claim which was barred by the act of limitations, so as to bind the testator's estate, because among other valid reasons, there may be evidence in the hands of the other executors, that no such claim exists.(c)

*Art. 2.—How far executors are liable for the acts of each other.*

2181. As a general rule, it may be laid down, that each executor is liable for his own wrong or *devastavit* only, and not for that of his colleague.(d) He may

(a) *Ness v. Vanswearingen*, 7 S. & R. 192, 196; S. C. 10 S. & R. 144.

(b) *Bac. Ab. h. t.*; 11 *Vin. Ab.* 358; *Com. Dig. Administration*, B. 12; 1 *Dane's Ab.* 583; 2 *Litt. Kty. Rep.* 315; 16 S. & R. 337; *Rick v. Gilson*, 1 *Penn. St. R.* 54.

(c) 6 *Penn. St. R.* 267.

(d) *Douglass v. Satterlee*, 11 *John.* 16; *Williams v. Holden*, 4 *Wend.* 223; *Moore v. Tandy*, 3 *Bibb*, 97.

be rendered liable, however, for the misplaced confidence he may have reposed in his coëxecutor. As, if he sign a receipt for money, in conjunction with his coëxecutor, and he receives no part of the money, but agrees that his coëxecutor shall retain it, and apply it to his own use, this is his own misapplication, for which he is responsible.(a)

An executor is justified in putting money in the hands of his coëxecutor for a legitimate purpose of the estate, when the act is not an imprudent one; as, where an executor living in London delivered money to his coëxecutor, who had been the confidential agent and attorney of the testator, for the purpose of paying debts in the country where he resided, and the money was lost by his insolvency, it was held that the executor who had so delivered the money, should not be charged with the loss.(b)

*Art. 3.—Of the rights of the surviving executor.*

2182. Upon the death of one of several executors, the survivors or survivor, has generally all the powers to administer the personal estate.(c) But when special powers are given by the testator to all the executors in relation to the sale of real estate, on the death of some of them, the survivors cannot in general act.(d) In Pennsylvania, the survivor is authorized by act of assembly to perform all such acts.(e)

(a) *Davis v. Spurling*, 1 Russ. & M. 64; 2 Will. on Ex. 1292; 1 P. Wms. 241, n. 1. See *Young v. Wickliffe*, 7 Dana, 447; *Johnson v. Corbett*, 11 Paige, 265.

(b) *Bacon v. Brown*, 5 Ves. 331. See *Chambers v. Minchen*, 7 Ves. 193; *Joy v. Campbell*, 1 Scho. & Lef. 341.

(c) Com. Dig. Administration, B 12; Ham. on Parties, 148.

(d) But see *Chanet v. Villeponteaux*, 3 McCord, 29; *Sharp v. Pratt*, 15 Wend. 610; *Taylor v. Galloway*, 1 Ham. 232; *Bull v. Bull*, 3 Day, 384; *Digges v. Jarman*, 4 Har. & McH. 485; *Smith v. Moore*, 6 Dana, 417.

(e) Act of 12 March 1800, 3 Sm. L. 433.



§ 5.—Of the interest executors have in the estate.

2183. An executor derives his interest from the will, and all the property of the testator, from the time of his death, vests in his executor.<sup>(a)</sup> By the common law he has a right to take possession of all choses in possession, and to collect or release choses in action by virtue of the will alone. But he cannot declare or claim a right in a court of law, without showing his authority by producing letters testamentary. In some states, his right is inchoate only, until he has obtained letters testamentary, and probate of the will has been made.

2184. The *probate* of a will is the proof made before an officer appointed by law, that an instrument offered to be proved is the act of the person whose last will and testament it purports to be. Upon proof being so made, and security being given, where the laws require such security, the officer grants to the executors letters testamentary, or when there are no executors appointed, or they are all dead, or incapable of serving, he grants letters of administration *cum testamento annexo*, with the will annexed, so that the administrator shall conform himself to the provisions of the will.

The executor, armed with this additional authority, is now fully vested with all the rights of the testator at the moment of his death; and, in this capacity, he has a complete control of his personal estate, and with such power over the real, as the will vests in him. But still he holds as a trustee for the benefit of creditors, legatees, and others who may have an interest in such property.

So complete is his authority, that a payment made to him is good, although a later will may afterward

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(a) *Woolley v. Clark*, 5 Barn. & Al. 744; *Sneed v. Hooper*, Cooke, 200; *Overfield v. Bullitt*, 1 Mis. 749.

be discovered, or even when the paper on which the probate was obtained was a forgery. This decision is made upon the ground that the probate is a judicial act, and, while unimpeached, it is binding. (a)

The officer who takes the probate is variously denominated; in some states, he is called judge of probate, in others register of wills, and surrogate in others.

2185. In some of the states the probate is conclusive both as to real and personal property, in others, it is not conclusive as to land; this is the case in Pennsylvania.

§ 6.—Of the powers and duties of executors.

2186. For the purpose of carrying out the intentions of the testator, and to perform the duties incumbent on him, the law has invested him with the power of bringing suits, in his own name, to recover the rights of the testator; and in order to enable others to obtain their just rights from him, he may be sued for debts due by the testator, and, on a judgment against him, the assets in his hands will be liable.

2187. In the performance of his duties, he is required to act in good faith, and to use due diligence. (b) His principal duties are the following:

1. To bury the testator in a manner suitable to the estate he leaves behind him; and when there is reason to believe he died insolvent, he is not warranted in expending more in funeral expenses than is absolutely necessary.

It is not easy to gather from the numerous cases decided on the subject what amount will be allowed for *funeral expenses*. Courts of equity have taken into consideration all the circumstances of each case, and

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(a) *Allen v. Dundas*, 3 T. R. 125; *Foster v. Brown*, 1 Bailey, 221.

(b) *Kee v. Kee*, 2 Gratt. 116.

when executors have acted with common prudence, and in obedience to the will, their expenses have been allowed. In a case where the testator directed to be buried in a church thirty miles distant from the place of his death, the sum of sixty pounds sterling was allowed;(a) and, in another, under peculiar circumstances, an allowance of six hundred pounds was made.(b) In Pennsylvania, where the deceased left a considerable estate, and no children, the sum of two hundred and fifty-eight dollars and seventy-five cents was allowed, the greater part of which was expended in erecting a tombstone over a vault in which the body was interred.(c)

2. To collect the goods of the deceased, without unnecessary delay, provided he can do so peaceably; when resisted, he must apply to the law for redress.

3. The executor is bound to prove the will in the proper office, before the officer appointed by law. This is required in order to give him complete authority. Should he decline to do so, the officer who has jurisdiction of the matter, can compel him either to prove the will, or to renounce.

4. He is required to make an inventory of all the goods and chattels which come to his hands, and file it in the office where the probate has been made.(d) This is as well for his own security as for the safety of the creditors and legatees, who are entitled to such goods.

The *inventory* is a list, schedule, or enumeration in writing, containing, article by article, a description of the goods and chattels, rights and credits of the testator. In the enumeration of the debts due to the

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(a) *Stag v. Punter*, 3 Atk. 119.

(b) *Proc. in Chan.* 29.

(c) *Appeal of Ann McGlinsey*, 14 S. & R. 64.

(d) *Griswold v. Chandler*, 3 N. H. Rep. 492; *Scott v. The Governor*, 1 Mis. 686.

testator, those debts which are sperate should be separated from those which are desperate, for if they are all returned without any distinction, the executor may be required to show that a debt is desperate, whereas, if it be returned as such, the presumption will be that it is so, and proof of its character will lie upon those who affirm it is good.(a)

5. He should ascertain the state of debts and credits of the estate, and endeavor to collect all such claims with as little delay as possible, consistently with the interest of the estate.

6. He should advertise for debts and credits. As he is not bound to pay the debts until after the end of one year from the time he began to act, he should, during this time, ascertain all the debts due by the testator at the time of his death; if he should incautiously pay a debt in full, and then find that he had not assets to pay all the debts, he would be the loser of the amount he had paid beyond what the creditor would have been entitled to. In the advertisement he should not promise to pay the debts of the testator, but simply require the creditors to present them for consideration. He should cautiously abstain from making any engagement to pay the debts of the testator, or he may be made personally liable; as where the testator died indebted to A, and the executors incautiously signed an agreement indorsed on A's account, as follows: "Mr. A having consented to wait for the payment of the within account, we, as executors of B, engage to pay Mr. A interest on the same at the rate of five per centum until the same is settled;" it was held that the executors were personally liable to pay the debt and interest, because the original debt did not carry interest against the estate, and

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(a) 1 Ohit. Pr. 520; 2 Will. on Ex. 6441; Toll. Ex. 248.

therefore the engagement was considered as personal.(a)

7. He should reduce the whole of the goods, not specifically bequeathed, into money, with all due expedition.

8. He is bound to keep the money of the estate in bank, but not mixed with his own account, or he may be charged interest on it.

9. An executor must be at all times ready to account, and actually file an account in the proper office within a year.

10. He is bound to pay the debts of the testator, and the legacies bequeathed by him, in the order required by law.

§ 7.—Of the liabilities of executors.

2188. Executors are of course liable for all the assets which come to their hands belonging to the estate of the testator, and they are required to account for them. In general, this account is to be rendered to the officer before whom the will is proved.

But executors become accountable frequently, where they have not received any property, in consequence of their acts. They are personally liable upon the contracts of the testator, when, for a sufficient consideration, they promise to pay them;(b) and they may be made responsible when, for their neglect to sue,(c) or to sell property,(d) a loss occurs to the estate; but when they act with ordinary prudence, in these cases, they will not be made liable for such a loss.

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(a) *Bradley v. Heath*, 3 Simons, 543.

(b) *Sims v. Stilwell*, 3 How. Mis. 176; *Hopkins v. Morgan*, 7 Monr. 1; *Sleighter v. Harrington*, 2 Murph. 332.

(c) *Jennings v. Weeks*, 1 Rice, 453.

(d) *Estate of Secondo Basio*, 2 Ashm. 437; *Griswold v. Chandler*, 5 N. Hamp. 492.

And keeping money idle, when it could have been employed and made to bring interest, is a *devastavit*.(a)

They are bound to administer the assets, and not to trade with them; where an executor trades with the assets, the law holds him responsible for all the losses which he may sustain, and the profits he makes, should he make any, belong to the estate; this rule is adopted to prevent frauds.(b)

The will is the law of the executors, they are, therefore, bound to invest the assets as it directs, and a departure from its direction will render the executors liable for any loss that may occur.(c)

Executors are not only bound to administer the assets, but to administer them according to the provisions of the law. They must, therefore, pay the debts in the order prescribed by law, and any deviation in this respect, will make them responsible to such creditors as may be postponed by such mispayment.(d)

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#### CHAPTER IV.—OF TITLE TO REAL PROPERTY BY OCCUPANCY.

2189. By occupancy of real estate, is meant the actual taking possession of such estate, which belongs to nobody, with an intention of becoming the owner of it.

2190. All the lands in the country were originally vested in the United States, or in some one of them; no person can, therefore, have any right by occupancy in such lands; for it is a principle of law, of universal application, that no prescriptive or customary right can be acquired against the government. Persons known as squatters, who take possession of any of the

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(a) *Slade v. Slade*, 10 Verm. 192; 1 S. & R. 241. See *Karr v. Karr*, 6 Dana, 3.

(b) *Callaghan v. Hill*, 1 S. & R. 241.

(c) *Nyce's Estate*, 6 W. & S. 254.

(d) *Swift v. Miles*, 2 Rich. Eq. 147.

unoccupied lands of the general or of any state government, gain no title to such lands.

2191. When considering the things which are the objects of property, we stated to whom an island belongs, when formed out of the sea, or when it arises in rivers.(a) It is clear that a stranger cannot claim such island by occupancy and appropriate it to himself.

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#### CHAPTER V.—OF TITLE BY PRESCRIPTION.

2192. Another method of acquiring title to real estate, is by prescription. *Prescription*, in one sense, is the act of acquiring real property by a long, honest, and uninterrupted possession or use, during the time required by law; and in another sense, this word signifies the extinction of a right to such property by permitting it to lie dormant during the same time. The first may be denominated a positive, and the last a negative prescription.

2193. By the civil or Roman law, a *positive* prescription was designated by the name *usucapio*, or *usucapion*, from the circumstance that the person who acquired property in this manner might be said *usu rem capere*. In some of the states of the Union, the act of limitations is of the same nature, and has some of the effects of the *usucapion* of the civil law.(b)

2194. *Negative* prescription, on the contrary, has no direct operation upon the *rights* of property, it is applied only to the *remedies*. It is therefore rather an *exoneration* than an *acquisition*.

This chapter will be divided into six sections: 1, of the general rules of prescription; 2, of the time required to gain a title by prescription; 3, of the things

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(a) Ante, n. 433.

(b) Ang. on Lim. 18.

to which a title can be gained; 4, of the parties to a prescription; 5, of the right by which a prescription is claimed; 6, of the operation of the statutes of limitations.

SECTION 1.—OF THE GENERAL RULES RELATING TO  
PRESCRIPTION.

§ 1.—Of the nature and origin of the right.

2195. The law secures to the owner of an estate the rights which he has, upon condition that he will at all times assert them, so as not to induce another to fall into an error respecting them. If, for a sufficient length of time, he neglects them, so as to put in peril the rights of another, he will not be allowed to reclaim them. The possessor who has, *bona fide*, acquired his possession, perhaps for a valuable consideration, or received it as an inheritance from his ancestors, and who, had the former owner manifested an intention to establish a right, might have acquired another estate, and not improved the one he holds, has a right superior to such claimant.

The law raises the just presumption, that when the owner has for a long time neglected his rights, without any good reason to prevent him from asserting them, he has abandoned them, and that the possessor has acquired such rights by a grant from the former owner. This is perfectly just, both on account of the parties, and for the purpose of protecting society from the disorders which would arise did a different rule prevail.(a)

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(a) *Odiorne v. Wade*, 5 Pick. 421; *Gayetty v. Bethune*, 14 Mass. 49; *Sumner v. Tileston*, 7 Pick. 198. See *Branch v. Doane*, 17 Conn. 402; *Strickler v. Todd*, 10 S. & R. 69; *Kingston v. Lesley*, 10 S. & R. 390; *Nitzell v. Paschall*, 3 Rawle, 82; *Butz v. Ihrie*, 1 Rawle, 218; *Yeakle v. Nare*, 2 Watts, 123; *Esling v. Williams*, 10 Penn. St. Rep. 126; *Young v. Collins*, 2 Browne's Rep. 292; *Sumner v. Murphy*, 2 Hill, S. O. Rep. 488; *Simmons v. Parsons*, 2 Hill, So. Car. Rep. 492; *Stodden v. Powell*, 1 Stew. 287.



## § 2.—Of the conditions requisite.

2196. As the right of prescription is presumed to rest upon a grant, which may have been lost, the possessor who claims title by this right is required to show distinctly, first, the use and occupation or enjoyment of the right in question; secondly, the identity of the thing enjoyed; and, thirdly, that such enjoyment has been adverse to the right of some other person.<sup>(a)</sup>

2197. Let us examine these a little more in detail.

1. There must be *an adverse possession*. By this is understood the enjoyment of land, or such estate as lies in grant, under such circumstances as indicate that such enjoyment has been commenced, and continued, under an assertion of rights on the part of the possessor, to the exclusion of another who claims to have a title.

But it is not every possession which is adverse; a man may hold apparently adversely to another, and yet his tenure may not have that effect. There are four general rules by which it may be ascertained that possession is not adverse; these will be separately considered.

1° When both parties claim under the same title; as, if a man seised of certain lands in fee, have issue two sons and die seised, and one of the sons enter by abatement into the land, the entry is not adverse; for when the abator entered into the land of his father, before entry made by his brother, the law intends that he entered claiming as heir to his father, by which title the other son also claims.<sup>(b)</sup>

2° When the possession of one party is consistent with the title of the other; as where the rents of a trust estate were received by a *cestui que trust* for more

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(a) *Lawton v. Rivers*, 2 McCord, 445; *Lajoie v. Primm*, 3 Mis. 529.

(b) Co. Litt. s. 396.

than twenty years after the creation of the trust, without any interference of the trustee, such possession being consistent with, and secured to the *cestui que trust* by the terms of the deed, the receipt was held not to be adverse to the title of the trustee.(a)

3° When, in contemplation of law, the claimant has never been out of possession; as where Paul devised lands to John and his heirs, and died, and John also died, and afterward the heirs of John and a stranger entered, and took the profits for twenty years; upon an ejectment brought by the devisee of the heir of John against the stranger, it was held that the perception of the rents and profits by the stranger, was not adverse to the devisee's title; for, when two men are in possession, the law adjudges it to be the possession of him who has the right.(b)

4° When the occupier has acknowledged the tenant's title; as, if a lease be granted for a term, and, after paying the rent for the land during such term, the tenant hold for twenty years without paying rent, his possession will not be adverse; for when a man commences his possession in right of another he will be presumed to hold by the same right.(c)

A mere declaration of adverse possession gives no right;(d) to constitute adverse possession there must be *pedis possessio*, or a substantial inclosure; but an artificial fence, or other erection, is not indispensable. A river, mountain, or continued ledge of rocks, by which the intrusion of cattle is prevented, is sufficient.(e)

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(a) 8 East, 248.

(b) *Ld. Raym.* 329.

(c) See *Medford v. Pratt*, 4 Pick. 222; *Gloucester v. Beach*, 2 Pick. 60, n.; *Kirk v. Smith*, 9 Wheat. 241.

(d) *Shepley v. Lytle*, 6 Watts, 500.

(e) *Bayley v. Irby*, 2 N. & M. 343.

2. As fraud vitiates every thing, to gain a right by possession, the party must have entered *bona fide*.<sup>(a)</sup>

3. But although the possessor may have entered *bona fide*, and he may have holden by an adverse possession, yet this possession must have been continued uninterruptedly, or he will not gain a right by prescription. By *interruption*, is meant some act or circumstance which stops the course of prescription or act of limitations.

The interruption of the use of a thing is natural or civil. A physical or *natural* interruption takes place when the owner regains the possession of the estate so as to eject the wrongful possessor. This takes place when the owner enters into the land and turns out the possessor before he has acquired a right by prescription.

*Civil* interruption is that which takes place by some judicial act, as the commencement of a suit to recover the land in dispute, which gives notice to the possessor that the thing which he possesses does not belong to him. When the title has once been gained by prescription, it will not be lost by interruption of it, unless such interruption be continued to gain title by prescription. When the interruption takes place before the right has been acquired, it merely suspends the acquisition, and the time from running. Such interruption, renders useless the time which has preceded, and the possessor must commence anew in order to gain a title by prescription.

Natural interruption has a general effect with respect to the claims of all men. The reason of this is that by it one of the essential requisites for prescription, namely, possession, ceases in fact, therefore prescription cannot take place at all, nor, consequently,

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<sup>(a)</sup> Jackson v. Halstead, 5 Cowen, 216; Livingston v. Peru, etc., 9 Wend. 511.

against any one person more than another. But the effect of civil interruption, or interruption in law, by action, is not general but relative. So soon as a claim to the property is brought into court, the possessor is bound to relinquish it, if the claim be made good, and that obligation necessarily deprives him of the right of acquiring the property by prescription as against that claimant. The obligation toward that claimant, however, cannot produce any legal effect, with respect to other persons. Besides *lex civilis vigilantibus scripta est*, and, while the claimant must not be deprived of the benefit of his vigilance and activity, which enable him to claim before the right acquired by prescription was completed against him, there is no reason why his vigilance should benefit others who were not so vigilant. .

SECTION 2.—OF THE TIME REQUIRED TO GAIN A TITLE BY  
PRESCRIPTION.

2198. By the old English law, to obtain a title by prescription it was necessary to hold "the time whereof the memory of man runneth not to the contrary," which time commenced at the beginning of the reign of Richard I. This time being beyond the settlement of this country, it is evident there can be no prescription in this sense. In modern times, upon proof of an *adverse, exclusive, and uninterrupted enjoyment of a right for twenty years*, and upward, unexplained, a jury may be directed to presume a right by grant or otherwise.(a) When, however, there are circumstances

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(a) 2 Saund. 175, a; Story v. Odin, 12 Mass. 159; Gayetty v. Bethune, 14 Mass. 49, 55. In Missouri it was held that there could not be a prescription, between private individuals, short of thirty years, unless the title commenced in a fair and formal manner. Lajoie v. Primm, 3 Miss. 529. To claim land by length of possession, in Tennessee, there must have been seven years' peaceable possession, under color of title. Patton v. Hynes, Cooke, 356; McIver v. Reagan, Cooke, 366; S. C. 2 Wheat. 25. See Strickler v. Todd, 10 S. & R. 69; Newman v. Rutter, 10 S. & R. 509;

which explain this apparent acquiescence, the right will not be acquired.(a)

SECTION 3.—OF THE THINGS TO WHICH A TITLE CAN BE  
GAINED BY PRESCRIPTION.

2199. Blackstone lays it down “that nothing but incorporeal hereditaments can be claimed by prescription, as a right of way, a common, etc;” but no prescription can give title to lands and other corporeal substances, of which more certain evidence may be had.(b) Bracton, on the contrary, following the doctrine of the civil law, seems to consider it as alike effectual with respect to corporeal and incorporeal property. In this country this latter doctrine seems to prevail.(c) But, when there is a mere possession, unaccompanied by other evidence, which affords a presumption of title, a distinction has been introduced, by reason of the statute of limitations, between corporeal subjects, such as lands, and things incorporeal. As a grant of land confers an entire title, it cannot be presumed from mere possession alone for any length of time short of that prescribed by the statute of limitations. The reason assigned for this is, that with respect to corporeal hereditaments, the statute has made all the provisions; and has thereby taken these cases out of the operation of the common law.(d) It is a rule, that what is to arise by matter of record

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*Kingston v. Lesley*, 10 S. & R. 390; *Young v. Collins*, 2 Browne's Rep. 293; *Worrall v. Rhoads*, 2 Whart. 427; *McElroy v. The Rail Road*, 7 Penn. St. Rep. 536; *Ealing v. Williams*, 10 Penn. St. Rep. 126. The courts are inclined to adopt the periods mentioned in the statutes of limitations, in all cases analagous in its principles. *Ricards v. Williams*, 7 Wheat. 110; *Coolidge v. Learned*, 8 Pick. 504; *Melvin v. Whiting*, 10 Peters, 295.

(a) Ante, n. 1620. See *Daniel v. North*, 11 East, 372.

(b) 2 Bl. Com. 264.

(c) *Melvin v. Proprietors, etc.*, 16 Pick. 137; *Ricard v. Williams*, 7 Wheat. 109.

(d) 1 Greenl. Ev. § 17.

cannot be prescribed for, but must be claimed by grant entered on record.(a)

SECTION 4.—OF THE PARTIES TO A PRESCRIPTION.

2200. This section will be divided into two heads, under which will be considered, 1, by whom prescription may be acquired; 2, against whom.

§ 1.—By whom prescription may be acquired.

2201. All persons *sui juris* may acquire a title by prescription; but a prescription must always be laid in him who is the tenant of the fee. Tenants for life, for years, or at will, cannot prescribe, by reason of the imbecility of their estates.(b) When the title has been granted by one who had possession to another person, or the right has descended, the time of enjoyment by those in privity, with the claimant, as in the relation of heir and ancestor, or grantor and grantee, may be joined.(c)

§ 2.—Against whom a prescription may be acquired.

2202. A title by prescription may be acquired against strangers, against co-tenants, but not against the public.

1. When there is no privity, or any connection whatever, between the possessor and the claimant, and the latter has held the land or used the easement adversely, exclusively, and uninterruptedly for twenty years, little difficulty can occur. Upon proof of these facts, the possessor will establish his title, unless the claimant at the time labored under some of the disabilities mentioned in the statutes of limitations.

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(a) 2 Bl. Com. 265.

(b) 2 Bl. Com. 264, 265.

(c) Sargent v. Ballard, 9 Pick. 251.

2. Although when a man who has a title with another enters on the land, he is presumed to enter by virtue of the joint title, and to hold for himself and his co-tenant, yet when he manifests an intention not to hold for himself and his companion, but adversely to the latter's rights, he will gain a title by such adverse possession; as where he takes the profits and claims the whole adversely for twenty-one years, exclusively, the jury will be directed to presume an ouster though none be proved.(a)

3. No prescription can in general be acquired against the public, and no length of possession will alone give a right to the possessor against the state.(b)

SECTION 5.—OF THE RIGHT BY WHICH A PRESCRIPTION IS CLAIMED.

2203. The right by which a prescription is claimed is of two kinds; it is *personal* when exercised by one in his own right or who has derived it from his ancestors, or by a corporation and their predecessors; it is then called a prescription *in the person*; or else it is attached to the ownership of a certain estate, and therefore it is denominated a prescription *in a que estate*. The latter must always be laid in the owner of the fee, in whose right it is claimed, even though by one claiming a particular estate; because the nature and commencement of the interest of the latter, clearly negatives any immemorial occupancy. Hence he must prescribe, if at all, under cover of the tenant in fee;(c) for when a man prescribes in a *que estate*, that is in himself and those whose estate he holds, nothing is claimable, but such things as are incident, appendant, or appurtenant to the lands.

(a) *Frederick v. Gray*, 10 W. & S. 182. See *Cullen v. Motzer*, 13 S. & R. 356; *Lodge v. Patterson*, 3 Watts, 77; *Watson v. Gregg*, 10 Watts, 296; *Gregg v. Blackmore*, 10 Watts, 192.

(b) *Wilson v. Stoner*, 9 S. & R. 39.

(c) 2 Bl. Com. 264, 265.

## SECTION 6.—OF THE OPERATION OF THE STATUTES OF LIMITATIONS.

2204. We have stated that a negative title by prescription arises from the operation of the statutes of limitations. This title arises from the possession of real estate for a certain period, after which, the statutes of limitations deprive an adverse claimant of all remedies for the recovery of his supposed rights. It will be perceived that the title claimed by prescription is not founded on the same principle as that which arises from the statute of limitations. In the first case the possessor claims by *virtue of a right*, in the second, because the plaintiff has *no remedy*. But though different in principle, still, the result is the same, because a right which cannot be enforced, must, in law, be considered as having no existence.

The reader ought to bear in mind the distinction which exists between a *positive prescription*, and that which consists in *taking away the remedy* by statute, because this may have a very important consideration in deciding on the constitutionality of the laws. In general, statutes of limitations are prospective only; their object is to establish that a certain lapse of time shall amount to evidence of transfer of property. A statute which would take away a man's remedy, so as *wholly* to deprive him of his right, would be considered a violation of the constitution, which guarantees to all the right of property.(a)

The presumptive rights which have been mentioned in the preceding sections, which are evidence of a *positive prescription*, are said to apply to those cases which are not within the acts of limitations.(b)

2205. The principal statutes which regulate this

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(a) *Gospel Society, etc. v. Wheeler*, 2 Gallis. 105.

(b) 1 Verm. 53.



subject, are the 32 Henry VIII., c. 2, and 21 Jac. I., c. 16; the principles of which have been reenacted or adopted in most of the states of the Union,<sup>(a)</sup> and are the law there.

The statute of 32 H. VIII., enacts that no writ of right shall be brought, or claim, or prescription made, for any lands, etc., or other hereditaments, upon seisin of any ancestor or predecessor, unless such seisin was within sixty years, before the teste of the writ, or upon one's own seisin, within thirty years.

The statute of James provides that writs of forme-don, in descender, etc., shall be brought within twenty years next after the title and cause of action first had descended or fallen, saving, however, to infants, femmes covertes, persons non compos, imprisoned<sup>(b)</sup> or beyond sea, or to their heirs, the right of suing within ten years from removal of such disability, or from their deaths under such disability.<sup>(c)</sup>

#### CHAPTER VI.—OF TITLE BY CUSTOM.

2206. Allied to prescription is the right acquired by custom. The principles which govern the subject are, in general, the same as those which regulate prescriptions. It must be remembered, however, that title by custom must be confined entirely to incorporeal hereditaments.

The distinction between prescription and custom, seems to be this, that custom, by which must be understood a particular custom, is a local usage, not annexed to the person; as, for instance, for all the

(a) The statute 32 H. VIII., c. 2, s. 2, has not been adopted in Maryland. *Pancoast v. Addison*, 1 Har. & John. 356. In Louisiana, another system has been adopted.

(b) In Tennessee, it has been held that *slavery* is an *imprisonment* within the meaning of the statute. *Matilda v. Crenshaw*, 4 Yerg. 299.

(c) See Co. Litt. 114, b.

tenants of a manor to have a common of pasture; while prescription is always annexed to a particular person. An easement is said to be a service which one neighbor has of another, and may be claimed, and the right to it be established, by prescription; but a multitude of persons cannot prescribe for an easement, though they may plead a custom.(a)

A *custom*, we have seen,(b) is a usage which has acquired the force of law: these customs are general or particular. Particular customs are those which affect the inhabitants of some particular districts only. It is by virtue of such particular custom that title is acquired in certain incorporeal hereditaments.

To make it a good custom, the right must have been exercised for a time beyond legal memory, which goes back to the reign of the English Richard I. But, now, if the existence of a custom at a distant time be shown, and there is no proof of its non-existence at any time, a jury may infer it went back to the time of legal memory.(c)

When a right can be claimed by prescription, it cannot, in general, be acquired by custom; a custom to take the profit in alieno solo, therefore, is bad; the proper mode of acquiring the right, is by prescription.(d)

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(a) 2 John. 362.

(b) Ante, n. 121; Bac. Ab. Customs, A.

(c) Lenckhart v. Cooper, 7 Car. & P. 119; Jenkins v. Harvey, 1 O. M. & R. 877; S. C. 2 O. M. & R. 393.

(d) Grimstead v. Marlowe, 4 T. R. 717; Waters v. Lilley, 4 Pick. 125; Perley v. Langley, 7 N. Hamp. 283. See Ackerman v. Shelp, 3 Halst. 125; Luffkin v. Haskell, 3 Pick. 356.

### BOOK III.—OF INJURIES AND WRONGS.

2207. Having considered the rights and duties of persons, the nature of personal and real estate, and the manner of acquiring and losing title to all kinds of property, we are, in the next place, to inquire into the wrongs and injuries which men are liable to suffer from others in their persons and property.

2208. A *wrong* is a violation of a right. In its most usual sense it signifies an injury committed to the person, to his relative rights, or to his property, unconnected with contract; but in a more extended signification, wrong includes the violation of a contract; a failure by a man to perform his promise, is a wrong to him to whom it was made.(a)

Wrongs are divided into public and private. 1. A public wrong is an act which is injurious to the public generally, commonly known by the names of crime, misdemeanor, or offence. 2. Private wrongs are injuries to individuals, unaffecting the public.

2209. *Tort*, a term of a signification somewhat similar to wrong, is an unlawful act injurious to another, independent of any contract. Torts may be committed with force, as trespasses, which may be an injury to the person, such as assault, battery, and imprisonment; or they may be committed without force; torts of this last kind are to the absolute or relative rights of persons, or to personal property in possession or reversion, or to real property, corporeal or incorporeal in possession or reversion: these injuries may be either by non-feasance, malfeasance or misfeasance.

In the consideration of wrongs we will confine ourselves to those of a private nature. These naturally

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(a) 2 Bl. Com. 158.

divide themselves into, 1, such as affect the person; 2, such as relate to personal property; and 3, such as are injurious to real estate.

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TITLE I.—OF WRONGS TO THE PERSON.

2210. The injuries against persons are either absolute or relative.

CHAPTER I.—OF INJURIES TO THE ABSOLUTE RIGHTS OF PERSONS.

2211. The absolute rights of persons are vested, by the constitution and laws, in every freeman born in this country, or who is a citizen of the United States, or who is resident here, except he be an alien enemy, and the laws protect him in his own personal security of life, limb, body, health, reputation and liberty.

SECTION 1.—OF INJURIES TO LIFE, LIMB AND BODY.

2212. The injuries to life, limb and body, considered as private wrongs, are assaults and batteries; menaces and threats; and injuries arising from want of due care, and the like.

§ 1.—Of assaults and batteries.

*Art. 1.—Of their nature.*

2213.—1. An *assault* is an unlawful attempt or offer, with force and violence, to do a corporeal hurt to another, whether from malice or wantonness; for example, by striking at him, or even holding up the fist at him, in a threatening and insulting manner, or with circumstances as denote at the time an intention, coupled with a present ability, of actual violence against his person, as pointing a weapon at him when

he is within reach of it. Thus, levelling a gun at another within a distance from which, supposing it to be loaded, the contents might wound, is an assault;(a) or riding after a person and obliging him to run away into a garden to avoid being beaten, is also an assault.(b) Unless there has been an offer to strike, with an intention manifested at the time of committing an injury, there will be no assault.

*Abusive words*, however violent, cannot alone constitute an assault; they may, indeed, on the contrary, sometimes so explain the aggressor's intent, as to prevent an act *prima facie* an assault from amounting to such an injury; as, when a man during the sitting of the court of assizes, in a threatening posture, half drew his sword from its scabbard and said, "If it were not assize time, I would run you through the body;" it was adjudged that the act did not amount to an assault, for in that the intention to injure is an essential ingredient, and here it was wanting.(c)

Assaults are of two kinds, either simple or aggravated.

1. A *simple assault* is one where there is no intention to do another distinct injury.

2. An *aggravated assault* is one that, in addition to the base intention to commit it, has another object, which is also criminal; for example, if a man should fire a pistol at another and miss him, the former would be guilty of an assault with intent to murder; so an assault with intent to rob a man, or with intent to spoil his clothes, and the like, are aggravated assaults, and they are more severely punished than simple assaults.

2214.—2. A *battery* is the unlawful touching the person of another, either by the aggressor himself, or by any substance put in motion by him.(d)

(a) Com. Dig. Battery, C.

(b) *Morton v. Shoppee*, 3 Car. & P. 373.

(c) *Redman v. Edalfe*, 1 Mod. 3; Vin. Ab. Trespass, A 2; Hawk. c. 62, s. 1.

(d) 1 Saund. 29, b., n. 1; 3 Bl. Com. 120.

The unlawfulness of the act may arise from a *desire to do an injury* to the person beaten, from anger or revenge, or from mere rudeness and insolence.

A man may commit a battery for the purpose of committing an injury on another, and, from whatever motive he has been actuated, the offence is complete; the law cannot dive into the mind of the aggressor to ascertain his motive; if the injury is committed, malice will be inferred, unless the aggressor can excuse or justify his conduct.

The *motive* may be anger or revenge; when this is apparent, the least touch of the person of another will be considered an assault and battery, and the tortfeasor will be guilty of a trespass.

*Rudeness* alone may be the motive, and render the trespasser guilty of a battery, although the injury may be very slight indeed, provided the person injured has been touched. This term of rudeness is relative, and it is difficult to define it. Acts which one friend might do to another, could not be justified by persons altogether unacquainted; persons moving in polished society could not be permitted to do to each other what boatmen, hostlers, and such persons might perhaps justify; (a) because it might be fairly presumed in the case of the latter that an implied license had been given to commit such acts. An act which if done by one gentlemen toward a lady, might be considered as a battery, if done by one gentleman toward another, would not be viewed in that light. (b)

An injury, therefore, be it ever so small, done to the person of another in an *angry, revengeful, rude or insolent* manner, as by spitting in his face, violently jostling him, or knocking off his hat, is a battery. (c)

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(a) See 2 Hagg. Eccl. R. 73.

(b) Rex v. Nichol, Russ. & Ry. 130.

(c) 1 Hawk. P. O. 263. But it is said that taking it off a person is no battery, 1 Saund. 14.

2215. But to make the battery unlawful it must be *wilfully* committed, or proceed from *want of due care*, for otherwise it is *damnum absque injuria*, and the party aggrieved is without a remedy; as if a horse run away, without any fault of the rider, go over another person, and does him an injury, no action lies, because the injury is considered as proceeding, not from the man, but from the horse. But this is the case only where the rider is wholly without fault, for if he were riding furiously, or were otherwise in fault, he would be responsible. To excuse a trespass, the accident must be unintentional, unavoidable, and without the least fault of the trespasser.(a)

In criminal cases, it is a maxim that the act itself does not make a man guilty, unless it be done with a criminal intent, *actus non facit reum, nisi mens sit rea*, but in civil matters it is otherwise; therefore, in an action of trespass for an assault and battery, where the defendant pleaded that the plaintiff and himself were soldiers, at exercise, skirmishing with their muskets, and that in so doing the defendant, *casualiter et per infortunium et contra voluntatem suam*, in discharging his piece wounded the plaintiff; on demurrer the plea was held bad, for, say the court, a man shall not be excused a trespass except it has been committed utterly without his fault. The distinction is plainly marked between a case where the defendant has been in fault and where he has not, for supposing in this case, instead of pleading the above plea, the defendant had pleaded that the plaintiff ran across his piece when he was in the act of discharging it, it would have appeared to the court that it was inevitable, and that the defendant had been guilty of no negligence.(b)

2216. A battery may produce various effects which will now be explained.

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(a) *Jennings v. Fundeburg*, 4 McCord, 161.

(b) *Weaver v. Ward*, Hob. 134.

1. A *bruise*, or a contusion, is an injury done with violence to the person without breaking the skin.

2. A *wound* is an injury to a person by which the skin is broken. (a)

3. A *mayhem* is the act of unlawfully and violently depriving another of the use of such of his members as may render him less able in fighting, either to defend himself or annoy his adversary; and, therefore, the cutting, or disabling, or weakening a man's hand or finger, or striking out his eye or fore-tooth, or depriving him of those parts the loss of which abates his courage, is held to be a mayhem. But cutting off the nose or ear, or the like, are not held to be mayhems at common law, though they are grievous trespasses, for which damages will be recovered.

2217. In all these cases the party attacked may *defend* himself, but he must not use this right beyond the just bounds of self-defence; and for the redress of these wrongs, the law gives him an action of trespass.

2218. There are also injuries to the person, body, or limbs, which are occasioned by *negligence* or *misfeasance*; as where the damage is sustained from leaving open trap doors or areas in public streets, or suffering a dangerous dog or other animal to go at large, (b) or any injury arising from a similar cause. The remedy for such an injury is an action on the case.

*Art. 2.—When an assault and battery may be excused or justified.*

2219. A battery may be justified, 1, for the public good; 2, in the exercise of an office; 3, in aid of an authority in law; 4, as a matter of defence.

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(a) *Moriarty v. Brooks*, 6 C. & P. 684. Vide *Beck's Med. Jur.* ch. 15; *Roscoe's Cr. Ev.* 652.

(b) *Dilts v. Kinney*, 3 Green, 130.



1. *For the public good.*

2220.—1. For the wise purpose of enforcing obedience of inferiors to superiors, the law has invested the latter in many cases with the power of *correction*; which is the chastisement by one having authority, of a person under his lawful power who has committed some offence, for the purpose of bringing him to legal subjection.

It is chiefly exercised in a parental manner by *parents*, or those who stand in *loco parentis*. A parent may, therefore, justify the correction of the child, either corporally or by confinement; and a school-master, under whose care and instruction a parent has placed his child, may equally justify similar correction; but the correction in both cases must be moderate and in a proper manner, and for the good of the child; but if the parent or master have not acted in great violation of justice and propriety, their conduct will not be weighed in golden scales.(a)

For the same reason a *master*, who stands in *loco parentis*, may himself correct his apprentice for disobedience, but he cannot delegate his authority to another. A master has no right to correct his hired servants, who are not his apprentices.

Soldiers are bound to obey their superiors in all their lawful commands, and are justified in all their acts for such obedience; on the other hand they are liable to punishment for disobedience, and, therefore, a *superior* may inflict correction on them, and unless the punishment has been unlawful, he will be justified.

In order to maintain discipline in the national navy, as well as in the vessels of individuals, the law invests

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(a) Com. Dig. Pleader, 3 M. 19; Hawk, c. 60, s. 23, and c. 62, s. 2, c. 29, s. 5.

the *captains of vessels* with authority to reduce sailors to obedience.(a)

Any *excess* of correction by the parent, master, officer, or captain, may render the party guilty of an assault and battery, and liable to all the consequences of such an unlawful act.

2221.—2. An assault and battery may be justified when committed to *preserve the peace*; and, therefore, if the plaintiff assaults or is fighting with another, the defendant may lay hands upon him, and restrain him until his anger is cooled; but he cannot strike him in order to protect the party assailed, as he may in self-defence.(b)

2222.—3. Watchmen may arrest and detain in prison for examination, persons walking in the streets by night, whom there is a *reasonable ground to suspect of a felony*, although there is no proof of a felony having been committed.(c)

2223.—4. Any person has a right to arrest another to *prevent a felony*; for example, to prevent him from murdering his wife.

2224.—5. Any one may arrest another upon *suspicion of felony*, provided a felony has actually been committed, and there is reasonable ground for suspecting the person arrested to be the criminal, and that the party making the arrest, himself entertained the suspicion.

2225.—6. Any private individual may arrest a felon.(d)

2226.—7. It is lawful for any man to lay hands on another to preserve *public decorum*; as, to turn a person

(b) Abbott on Shipp. 160; 1 Chit. Pr. 73; 1 Ware's R. 83; 1 Pet. Adm. Dec. 168. By act of Congress of U. S., passed Sept. 28, 1850, flogging in the navy and on board vessels of commerce has been abolished. Minot's Stat. at Large, vol. 9, p. 515.

(b) 2 Roll. Ab. 359, (E), pl. 3.

(c) Lawrence v. Hedger, 3 Taunt. 14. See Rex v. Bootie, 1 Burr. 164.

(d) Hale, P. C. 89.

out of church, or to prevent him from disturbing a religious congregation or a funeral ceremony.(a) But a request to desist should first be made, unless the urgent necessity of the case dispenses with it.

2. *A battery may be justified in the exercise of an office.*

2227.—1. Watchmen, we have seen, may arrest suspicious persons at night, and they will be justified.

2228.—2. A constable is authorized, by law, to arrest any one, who, in his view, has committed a breach of the peace, and take him before a magistrate; but if an offence has been committed out of the constable's sight, he cannot arrest without a warrant, unless the offence amounts to a felony, or a felony is likely to ensue.

2229.—3. A ministerial officer, whose duty it is to execute the process of a court, or tribunal of competent jurisdiction, will be justified in its execution, whether the process be regular or irregular;(b) but if the court have no jurisdiction, he will be a trespasser; and, when the process is *wholly* illegal or *misapplied* as to the *person* intended to be arrested, without regard to any question of fact, or whether innocent or guilty, or the existence of any debt, then the party imprisoned may legally resist the arrest and imprisonment and may escape, or be rescued, or break prison; because he is not, in point of law, subject to any arrest;(c) as where process was issued against an ambassador to cause him to be arrested, the writ and proceedings are void, for want of jurisdiction in the court, or by reason of the privilege of the defendant, which privilege he cannot waive.(d)

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(a) *Clever v. Hynde*, 1 Mod. 168. See *Hall v. Planner*, 2 Keb. 124.

(b) *Codrington v. Lloyd*, 8 Ad. & Ell. 449.

(c) 1 Chitt. Pr. 637.

(d) *United States v. Benner*, 1 Baldw. 235, 240. See 4 Mass. 232; 13 Mass. 286, 334; 14 Mass. 210.

2230.—4. A justice of the peace may in general justify all acts, for which a constable would be justified, when acting without a warrant.

3. *A battery may be justified in aid of an authority in law.*

2231. Every person is empowered to restrain breaches of the peace, by virtue of the authority vested in him by law.

4. *A battery may be justified as a matter of defence.*

2232.—1. It may be justified by a man in *defence* of himself, his wife, his child or servant; so likewise the wife may justify a battery in defence of her husband; the child of its parent; the servant of his master.

In these cases, the party need not wait until a blow has been given, for then he might be too late, and disabled from warding off a second, or effectually protecting the person assailed. Care, however, must be taken that the battery transgress not the bounds of necessary defence and protection; for it is only permitted as a means of averting an impending evil, which might otherwise overwhelm the party, and not a punishment or retaliation for the injurious attempt. The degree of force necessary to repel an assault, will naturally depend upon, and be proportioned to, the violence of the assailant; but with this limitation any degree is justifiable.

2233.—2. A battery may also be justified in the necessary defence of *one's property*. Some rules, however, must be observed in order not to violate the law. If the plaintiff is in the act of entering peaceably into the defendant's land, or having entered, he is doing no violence, he must be requested to depart before any attempt is made to eject him; if he refuses, then, and not till then, the defendant may lay hands gently upon the plaintiff to remove him from

the close, and for this purpose he may use, if necessary, any violence short of striking the plaintiff. If the plaintiff resists the defendant, the latter may oppose force to force.(a)

But if the plaintiff is in the act of entering upon the land, for an *unlawful purpose*, or having entered, is discovered in the act of unlawfully subverting the soil, cutting down a tree, and the like, a previous request is unnecessary, and the defendant may instantly lay hands upon the plaintiff, for the time employed in requesting him to desist would add to the destruction of the property.(b)

A man may also justify a battery in defence of his personal property, without a previous request, if another attempt to take away such property out of his possession;(c) and in case of a felonious attempt to deprive him of his property, he may use any force to prevent it.

§ 2.—Of menaces and threats.

2234. A menace or threat is a malicious declaration of an intention to do an injury unlawfully to another; such as sending a threatening letter to another, and informing him that unless he does certain things the writer will commit an injury to his person, his relative rights or his property. This is a misdemeanor, for which the party aggrieved may cause the wrong doer to give security to keep the peace.(d) If the person menaced should sustain any pecuniary loss by such threat, or suffer any special damages, he may have an action on the case against the wrong doer.(e)

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(a) *Weaver v. Bush*, 8 T. R. 78.

(b) 8 T. R. 78.

(c) *Green v. Goddard*, 2 Salk. 641.

(d) *Hawk. B. 1, c. 53, a. 1*; 2 *Russ. on Cr.* 575; 2 *Chit. Cr. Law*, 841; 4 *Bl. Com.* 126.

(e) See *Com. Dig. Battery, D*; *Vin. Ab. h. t.*; *Bec. Ab. Assault*.

## SECTION 2.—OF INJURIES RELATING TO HEALTH.

2235. Private injuries affecting a man's health arise upon a breach of contract, either express or implied; or in consequence of some tortious act unconnected with a contract.

2236.—1. Those injuries to health which arise upon a contract are,

1st. The misconduct of medical men, when, through *neglect, ignorance, or wanton experiments*, they injure their patients. There are three kinds of mal-practice for which an action will lie, and sometimes an indictment can also be sustained: these are,

First. *Wilful* mal-practice, which takes place when the physician wilfully administers medicines, or performs an operation unlawfully, which he knows and expects will result in danger or death to the individual under his care; as in the case of criminal abortion.

Secondly. *Negligent* mal-practice, which comprehends those cases where there is no criminal or dishonest object, but gross negligence of that attention which the patient requires; as, if a physician should administer injurious medicines while in a state of intoxication.

Thirdly. *Ignorant* mal-practice, which is the administration of medicines, calculated to do injury, which do harm, and which well educated and scientific medical men would know were not proper in the case.(a)

2d. The sale of *unwholesome food*. Though the law does not in general consider a sale a warranty of the goodness of a personal chattel, it is otherwise with regard to food or liquors,(b) when sold for consumption.

2237.—2. Those injuries which affects a man's health, and which arise from tortious acts, unconnected with contracts, are,

(a) *Grannis v. Branden*, 5 Day, 260; 9 Conn. 209; 1 Saund. 312, n. 2.

(b) 1 Roll. Ab. 90, pl. 1, 2.

First. Public and private *nuisances*. A nuisance is any thing which unlawfully and tortiously does hurt, or causes inconvenience or damage. Nuisances are either public or private.

A *public* or common nuisance is such an inconvenience or troublesome offence, as annoys the whole community in general, and not merely some particular person.(a) To constitute a public nuisance, there must be such a number of persons annoyed, that the offence can no longer be considered a private nuisance; this is a fact which generally is to be found by the jury.

It is difficult to define what *degree of annoyance* is necessary to constitute a nuisance. In relation to offensive trades, it seems that when such trade renders the enjoyment of life and property uncomfortable, it is a nuisance; for the people of the neighborhood have a right to pure and fresh air.

A thing may be a public nuisance in one place which is not so in another; therefore the *situation* or *locality* of the nuisance must be considered. A tallow-chandler setting up his business among other tallow-chandlers, and thereby increasing the noxious smell of the neighborhood, is not guilty of setting up a nuisance, unless the annoyance is much increased by the new manufactory.(b) Such an establishment might be a nuisance in a thickly populated town of merchants and mechanics, where no such business was carried on.

A *private* nuisance is any thing unlawfully and tortiously done to the hurt or annoyance of the person, or of the lands, tenements or hereditaments of another.(c)

Where the injured party has sustained special

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(a) 1 Hawk. P. O. 197; 4 Bl. Com. 166, 167.

(b) R. x v. Neville, Peake's case, 91.

(c) 3 Bl. Com. 215; Finch's Law, 188.

damages, he may maintain an action for the loss he has sustained either by a public or private nuisance.

Secondly. On principle, it would seem that if a person's health be injured by a sudden frightening, as by a person wilfully assuming the appearance of a ghost, or doing any other act on purpose to terrify others, whose nerves are thereby injured, an action would lie for the consequence.<sup>(a)</sup>

### SECTION 3.—OF INJURIES TO REPUTATION.

2238. The law protects every man in his social intercourse, in his property, in his marriage, and lastly in any office he may hold; and the diminution of any of these rights by any false representation, either verbal or written, of the party who enjoys them, is an injury to him.

In selecting those among his fellow creatures, upon whom to repose, either his interest or his affections, every one will naturally discard all whom he suspects or believes to be unworthy of trust. The acquaintance which such a man has with the characters of men can be but limited, and, most usually, he derives his information in this particular from others. Should their report of any individual, however unfounded in truth, be unfavorable, though it may not operate conviction on his mind, it will engender distrust; for it can hardly be imagined that it is wholly a malicious falsehood. Men are not inclined to take the trouble to ascertain as to the truth or falsehood of statements made in relation to others, but when a man is so disposed, he has not, perhaps, an opportunity of examining the matter, nor is he able to disprove the charge to his own satisfaction, and trace its falsehood through all the varieties of knavery that produced it; so that should the party accused be in possession of his

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(a) 1 Chit. Pr. 43.



confidence or esteem, or become at any future time a candidate for either, he will naturally reject his claim in the one case, and renounce him in the other. Hence it is, that a charge or accusation which imports that a man is unfit for society, for his profession or his trade, for the marriage state, or for his situation of public trust, is likely to raise a suspicion or belief that he is really incapacitated, and thereby to cut off, or diminish his means of attaining to, or if already in possession, is likely to deprive him of, the enjoyment of either, and is therefore injurious. When the statement is false it is denominated *slander*, and renders its author liable to an action.

2239. Injuries to reputation consist in *written* or *verbal slander*, and *malicious prosecution*, imputing the guilt of some crime. Written slander comes within the definition of a libel; verbal slander, which is commonly called slander, simply, is very different from that which is written, as will be presently seen.

#### § 1.—Of libels.

2240. A *libel* is a defamation expressed either in printing or writing, or by signs or pictures, tending to blacken the memory of one who is dead, with intent to provoke the living; or the reputation of one who is alive, and expose him to public hatred, contempt, or ridicule.<sup>(a)</sup> It has been defined, perhaps with more precision, to be a false, censorious, or ridiculous writing, picture or sign, made with a malicious or mischievous intent, toward government, magistrates or individuals.<sup>(b)</sup>

In considering this head, it will be proper to inquire into, 1, the mode of conveying the libel; 2, of the kind of defamation it must consist; 3, how it must

(a) Hawk. b. 1, c. 73, s. 1; Wood's Inst. 444; 4 Bl. Com. 150.

(b) People v. Croswell, 3 John. Cas. 354; Steel v. Southwick, 9 John. 214; State v. Farley, 4 McCord, 317.

be expressed; 4, the mode of publication; 5, its justification; 6, the remedy.

*Art. 1.—Of the mode of conveying a libel.*

2241. The slanderous matter is usually reduced to writing or printing; but it must be remembered that a libel may be conveyed by signs or pictures. The exhibition of a picture, therefore, intimating that which in print would be libellous, is equally criminal. Fixing a gallows at a man's door, burning him in effigy, or exhibiting him in any ignominious manner, is a libel.(a)

*Art. 2.—Of the kind of defamation of which a libel must consist.*

2242. A libel against a private individual may either charge the party injured with a criminal offence, or something for which he could be indicted, if true; or it may exhibit him in a ludicrous point of view, and point him out as an object of ridicule and disgust. In short, the statement of any thing which is injurious to his business, or which is calculated to drive him out of society; as, to say that one has a loathsome disease,(b) is a libel. But saying that a man had such a disease, is not libellous, because, being cured, he is not to be kept out of society on that account.

Libels against the memory of the dead, which have a tendency to a breach of the peace, by inciting the friends and relatives of the deceased to avenge the insult to the family, render their authors liable to animadversion.(c)

But allegations, however false and malicious, contained in answers to interrogatories, in affidavits duly made,(d) or any other proceedings in courts of

(a) Hawk. b. 1, c. 73, s. 2.

(b) Villars v. Monsley, 2 Wilson, 203.

(c) 5 Co. 123; Commonwealth v. Taylor, 5 Binn. 281.

(d) 1 Saund. 132, note (1); Hodson v. Scarlett, 1 B. & Ald. 232.

justice, or petitions to the legislature, and communications to a governor, respecting an officer, although they are of a libellous character, are excusable, if they do not originate in malice, or without probable cause.(a)

Many acts which would be libellous, may be justified on account of the occasion upon which they took place.

*Art. 3.—How a libel may be expressed.*

2243. If the matter is understood as scandalous, and is calculated to excite ridicule or abhorrence against the party injured, it is libellous, however it may be expressed.(b) It is not unusual with artful libellers to use the figure of irony, in order to convey their poisoned shafts. This is a refined species of ridicule, which, under the mask of honest simplicity or ignorance, exposes the faults of others by seeming to adopt them; as, if the writer praise a soldier's prudence in not going into battle, because the public could not spare so brave a man.(c) Again, a publication in the form of an interrogatory is considered as libellous as if an assertion were made in answer to such interrogatory.(d)

*Art. 4.—Of the publication of a libel.*

2244. The publication of a libel is usually made by writing and exposing the writing to the view of others, or by printing in books, pamphlets, or newspapers, and in that case, the sale of each copy, when several copies have been sold, is a distinct publication, and a fresh offence. But there are other modes of publica-

(a) *Gray v. Pentland*, 2 S. & R. 23; S. C. 4 S. & R. 420; *Thorne v. Blanchard*, 5 John. 508.

(b) *Woolnoth v. Meadows*, 5 East, 463; *Robinson v. Jermyn*, 1 Price, 11, 17. *Schenck v. Schenck*, 1 Spencer, 208.

(c) *Hob. 215*; *Bac. Ab. Libel*, A 3; 3 *Ohit. Cr. Law*, 869; *Hawk. b. 1, c. 73, s. 4*. See *Southwick v. Stevens*, 10 John. 443.

(d) *Hotchkiss v. Oliphant*, 2 Hill, 510.

tion. The malicious reading of a libel to one or more persons; it being on the shelves in a bookstore, as other books, for sale; and where the defendant caused the libel to be printed, took away some of the copies and left others; these several acts were held to be sufficient publications.

2245. The publication must be *malicious*, but express malice is not necessary to be proved; such malice may be implied: for where a man publishes a writing which on the face of it is libellous, the law presumes he does so from that malicious intention which constitutes the offence, and it is unnecessary on the part of the prosecution, to prove any circumstance from which malice may be inferred.<sup>(a)</sup> But malice does not imply ill-will toward the person libelled.<sup>(b)</sup>

*Art. 5.—Of the justification of a libel.*

2246. A *justification* is an act by which a party charged, shows and maintains a good and legal reason in court, why he did the thing he is called upon to answer. The subject will be considered by examining 1, what acts are justifiable; 2, the manner of making the justification; 3, its effects.

2247.—1. In civil actions, a man may justify a libel, or slanderous words, by *proving their truth*, or because the defendant had a *right*, upon the particular occasion, either to write and publish the writing, or to utter the words; as, when slanderous words are found in a report of a committee of congress, or in an indictment, or a declaration; or words of a slanderous nature are uttered in the course of debate in the legislature, by a member, or at the bar, by counsel, when properly instructed by the client on the subject.

2248.—2. In general, the justification must be

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<sup>(a)</sup> *White v. Nicholls*, 3 How. U. S. 266.

<sup>(b)</sup> *Commonwealth v. Bonner*, 9 Metc. 410.

specially pleaded, and it cannot be given in evidence under the plea of the general issue.

2249.—3. When the plea of justification is supported by the evidence, it is a complete bar to the action.

*Art. 6.—Of the remedy for a libel.*

2250. There is no *preventive* remedy for a libel before it is published; a continued publication may, however, be prevented by destroying it, (a) but not by a cross libel against the wrong doer. (b) A compensation for the damages sustained may be recovered by an action, and the author may be punished by indictment. When the libel is contained in an affidavit or other legal proceedings, the party libelled may apply to the court to have the scandalous matter struck out, but, as has been before observed, no action can be maintained for such a libel. (c)

§ 2.—Of verbal slander.

2251. Slander, as distinguished from a libel, is the *malicious publication of words by speaking*, by reason of which the person to whom they relate, becomes liable to suffer corporal punishment, or to sustain some damage. This subject will be treated of with reference to, 1, the nature of the accusation; 2, the falsity of the charge; 3, the mode of publication; 4, the occasion; 5, the malice or motive; 6, the remedy.

*Art. 1.—Of the nature of actionable words.*

2252. Actionable words are of two descriptions; first, those actionable in themselves, without proof of

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(a) See 2 Campb. 511.

(b) *Stuart v. Lovell*, 2 Stark. 84.

(c) 1 Saund. 132, note (1).

special damages; and, secondly, those actionable only in respect of some actual consequential damages.

1. *Of words actionable in themselves.*

2253. Words of the first description must impute:

1st. The guilt of some crime for which the party, if guilty, might be indicted and punished by the criminal courts; as to call a person a "traitor," "thief," "highwayman," or to say that he has been guilty of "perjury," "forgery," "murder," or the like. And, although the imputation of guilt be general, without stating the particulars of the pretended crime, it is actionable: or,

2d. A false statement that the party has a disease or distemper which renders him unfit for society, is slanderous; (a) an action can therefore be sustained for calling a man a leper. (b) But as the reason why an action can be sustained for such a charge is, that it will exclude him from society, it follows, that if the charge has no such effect it will not be slanderous, as, where the charge was that the plaintiff had formerly had a contagious disease; (c) or,

3d. Unfitness in an officer who holds an office to which profit or emolument is attached, either in respect of morals, or inability to discharge the duties of the office; (d) or,

4th. The charge of a want of integrity or capacity, whether mental or pecuniary, in the conduct of a profession, trade or business, in which the party is engaged, is actionable; (e) as, to accuse an attorney, or artist of inability, inattention, or the want of integrity, or a clergyman of being a drunkard. (f)

(a) Bac. Ab. Slander, B. 2.

(b) Cro. Jac. 144; Starkie on Slander, 97. See Holt on Lib. 221.

(c) Bac. Ab. Slander, B. 2; 2 T. R. 473.

(d) Stark. on Slander, 100; Holt on Libels, 207; Rolle, Ab. 65.

(e) 1 Mal. Entr. 244.

(f) McMillan v. Birch, 1 Binn. 178.

*2. Of words actionable in consequence of special damages sustained.*

2254. There is a class of words which are actionable only in respect of the special damages sustained by the party slandered. Though the law will not, in those cases, permit the inference of damage, yet when the damage has actually been sustained, the party aggrieved may maintain an action for the publication of an untruth,<sup>(a)</sup> unless the statement be made for the assertion of a supposed claim. For example, a charge against the plaintiff of ingratitude toward others, or that he is a "rogue," a "rascal," a "scoundrel," or that he is "foresworn,"<sup>(b)</sup> is not slanderous; but if he could show he has sustained special damages in consequence of such charge, he could maintain an action for the recovery of a recompense to indemnify him for such a loss.

*Art. 2.—Of the falsity and certainty of a slanderous charge.*

2255. The slanderous charge must be *false*, but when the words are slanderous, the falsity of the accusation will be implied, till the contrary is shown. The instance of a master making an unfavorable representation of his servant, upon an application for his character, seems to be an exception; in that case, there being a presumption from the occasion of the speaking, that the words are true.<sup>(c)</sup>

2256. The injury of which the plaintiff complains being a loss of reputation, he must be *entitled to a good reputation* by his conduct, or he has not suffered any damages from the slanderous words. He is entitled to hold this reputation with the world, upon this condition only, that he has deserved the characteristics it

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(a) Com. Dig. Action upon the case for defamation, D 30; Bac. Ab. Slander, B.

(b) 1 Chit. Pr. 44.

(c) Stark. on Slander, 441, 175, 223.

confers ; and if the accusation be true, he cannot with any propriety, be said to have lost that to which he has no title whatever ; and with this reasoning agrees the civil law.(a)

2257. The charge must not only be false, but it must be certain *as to the person accused*. A charge made against one of a body of men, without designation of any one in particular, is not such slander as the speaker would be called to an account for ; as, if one should say, "one of the members of such a corporation is a thief," without designating any member, no one could sustain an action of slander against him.(b) And for the same reason, a charge made against a class of persons, is not such a slander of any one, that he can maintain an action for it.(c)

*Art. 3.—Of the mode of publication.*

2258. The publication of slanders is to communicate them to some person, *who is capable of understanding what is said* ; for if the hearer is unable, from any cause, to understand what is said, there is no publication. If, therefore, slanderous words are uttered in French or German, to a person who does not understand these languages, or in the presence of a man who has totally lost his hearing, it is not such a publication as will make the publisher liable to an action, because no one has comprehended the meaning of the slanderous words. A distinction is made in this respect between verbal and written slander, because when the slander is committed to writing, it may be seen afterward by those who may understand it.

2259. The slander must be published *respecting the*

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(a) Dig. 47, 10, 18.

(b) Bac. Ab. Slander, H. Ryckman v. Delavan, 17 Wend. 52 ; 23 Wend. 186 ; Wiseman v. Wiseman, Cro. Jac. 107.

(c) Ellis v. Kimball, 16 Pick. 132.



*plaintiff*, in order to entitle him to damages; a mother cannot, therefore, maintain an action for calling her daughter a bastard,<sup>(a)</sup> because although the inference is irresistible, that if the daughter is a bastard, the mother must have been guilty, yet as she was not slandered, she cannot maintain an action.

2260. Though formerly more latitude was allowed when a man *repeated* a slander which he had heard from another, yet, now, the courts are inclined to hold the repeater very strictly, and to allow no justification or excuse because he had heard it from another, unless he repeats the exact words he has heard, or at least their substance, without any addition or change on his part, and gives the name of his informer.<sup>(b)</sup>

*Art. 4.—Of the occasion of speaking slanderous words.*

2261. To render words actionable they must be uttered *without legal occasion*. Sometimes it is justifiable to utter slander of another, at other times it is excusable, provided the slander be uttered without express malice. It is justifiable for an attorney to use scandalizing expressions in support of his client's cause, when they are pertinent to it; but respectable counsel will never indulge in invective against the opposite party, except when justice imperiously demands such a course. Members of congress and other legislative assemblies cannot be called to an account for any thing said in debate.

*Art. 5.—Of the malice or motive of the slander.*

2262. Malice, considered in relation to torts, is the doing unlawfully an act injurious to another without a just cause. This term, when applied to torts, does

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(a) *Maxwell v. Allison*, 11 S. & R. 343.

(b) *McPherson v. Daniels*, 10 B. & Cr. 363.

not necessarily mean that which must proceed from a spiteful, malignant, or revengeful disposition, but a *conduct injurious to another*, proceeding from an ill-regulated mind, not sufficiently cautious, before it occasions injury to another.(a)

In some cases when a slander has been published, the law implies the fact that the charge was malicious from the mere circumstance that it was false; and the question for the jury is, not whether the intention of the publication was to injure the plaintiff, but whether the tendency of the matter published, was so injurious.(b) When, *prima facie*, it seems that the party speaking acted from good motives, and the object of the communication is to prevent the person to whom the representation is made from falling into error, and not to injure the party against whom it is made, express malice must be proved.(c)

*Art. 6.—Of the remedy.*

2263. A party who is aggrieved for the slander of another, has but one remedy when the slander is verbal, which is an action on the case for damages. But when the slander is written, as in the case of a libel, his remedy is not only an action on the case, but the libeller may be indicted. It may in some cases be advisable to indict the slanderer, as where the libel imputes immorality, which cannot be so well negatived by the testimony of others, for in that case the party slandered may support the prosecution by his own evidence, and negative all imputations on his character.

The injured party may adopt both remedies at the same time.

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(a) *Weckerley v. Geyer*, 11 S. & R. 39, 40; *Duncan v. Thwaites*, 3 Bar. & Cr. 584; S. C. 10 Eng. C. L. R. 179.

(b) *Fisher v. Clement*, 10 Bar. & Cr. 472; S. C. 21 Eng. C. L. R. 117.

(c) *Vide Peacock v. Reynell*, 2 Brownl. 151; *Stark. on Slander*, 441.

## § 3.—Of malicious prosecutions.

2264. By malicious prosecution or malicious arrest, is meant a wanton or vexatious prosecution or arrest, made by a prosecutor in a criminal proceeding, or a plaintiff in a civil suit, *without probable cause*, by a regular process and proceeding, which facts did not warrant, as appears by the result, by which the party prosecuted or arrested has sustained damages.(a)

An analysis of this definition will point out, 1, the nature of the prosecution or arrest; 2, who is liable under it; 3, what are malice and probable cause; 4, the proceedings; 5, the result; 6, the damages; and, afterward, 7, the remedy.

*Art. 1.—Of the nature of the prosecution or arrest.*

2265. The suit is either a criminal prosecution, as an indictment, a charge of a crime before a magistrate,(b) or a conviction before a magistrate; or it is a civil action.

A complainant who has a just cause of complaint is not authorized to add a groundless one, and prosecute both together; if that part which is groundless has subjected the plaintiff to an inconvenience, to which he would not have been exposed had the valid cause of complaint alone been insisted on, it is injurious; as, when an indictment for perjury contains various assignments, some of which are well founded, while others have been added maliciously, and without probable cause to authorize their insertion, an action as to these last may be maintained; because they would have been injurious if they had stood alone, and they are not made the less so, by being coupled with other charges which are warranted.(c)

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(a) See *Kerr v. Workman*, Addis. 270.

(b) *Miller v. Brown*, 3 Mis. 127.

(c) *Reid v. Taylor*, 4 Taunt. 616; *Buckley v. Wood*, 4 Co. 14.

Upon the same principle, such an action may be supported by one, who, though indebted to the defendant in a bailable sum, has been arrested by him for a larger amount than the sum due.(a)

2266. But in order to support an action for a malicious arrest, the process must have been regular; for when it is irregular, and wholly illegal or misapplied, it is as though no process had been issued, and the wrong doer will be liable accordingly. And when process has been set aside by the court, as being illegal and irregular, not only the plaintiff, but his attorney will be liable to an action; though such process will justify the officer who served it, if the court had jurisdiction, for the officer cannot inquire into the legality of the process, but he is bound to know that the court has jurisdiction of the subject matter, and over the parties.(b)

*Art. 2.—Who may be sued for a malicious prosecution.*

2267. When there is but one prosecutor or plaintiff who has caused a malicious prosecution or arrest, the suit must of course be brought against him alone; the action lies also against a mere informer.(c) But when the proceedings are regular, an action does not lie against an attorney, when he has been employed in the case.(d)

2268. All who joined in instituting a vexatious suit, may be made co-defendants, for the injury to the plaintiff was occasioned by an act in which all participated; therefore, if the suit was a civil action, not only is the plaintiff in such action bound to render a compensation, but a stranger who has procured its

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(a) See *Savage v. Brewer*, 16 Pick. 453; *Ray v. Law*, Pet. O. C. 207.

(b) *Codrington v. Lloyd*, 8 Ad. & Ell. 449; S. C. 35 Eng. C. L. 433; 15 East, 615, note (e).

(c) *Randal v. Henry*, 5 Stew. & Port. 367.

(d) *Bicknell v. Dorion*, 16 Pick. 478.

institution jointly with such plaintiff, is liable to the action, although he is not to be benefited by the event.(a)

But grand jurors who give information to their fellow jurors, on which the prosecution proceeds, are not liable for a malicious prosecution, because a grand juror is bound, by his oath, to disclose to his fellow jurors all crimes of which he is conscious.(b)

On the same ground a magistrate who procures witnesses to appear against a party indicted, and indorses his name on the indictment, does not render himself liable to an action for a malicious prosecution ; it being his duty so to act.

*Art. 3.—Of malice and want of probable cause.*

2269. To entitle the party injured to an action for a vexatious suit, there must not only be malice, which is the doing unlawfully an act injurious to another, without a just cause, but there must be a want of probable cause of action.

When there are grounds for suspicion, that a person has committed a crime or misdemeanor, and public justice and the good of the community require that the matter should be examined, there is said to be *probable cause* for making a charge against the accused.

Probable cause will always be presumed, and therefore he who sues for a malicious prosecution, will be required to show a want of it.

When probable cause does not exist, malice may be inferred,(c) but the want of probable cause is never inferred from the most express malice.(d)

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(a) *Shoftbey v. Waller*, Lane, 50.

(b) *Black v. Sugg*, Hardin, 556.

(c) *Blunt v. Little*, 3 Mason, 112.

(d) *Murray v. Long*, 1 Wend. 140 ; *Pangburn v. Bull*, 1 Wend. 245.

*Art. 4.—Of the proceedings.*

2270. To entitle the plaintiff to recover for a malicious prosecution, the proceedings must have been *regular* in the ordinary course of justice, and before a tribunal having power to ascertain the truth or falsity of the charge, and to punish the offender, the now plaintiff; for when the proceedings are irregular the prosecutor is a trespasser.

*Art. 5.—The malicious suit must be ended.*

2271. The malicious prosecution or malicious suit *must be ended*, for, until it has been decided, it cannot be said to have been entirely groundless, and this the plaintiff, who sues to obtain damages for a vexatious suit, is bound to show, either by his acquittal of a criminal charge, or by obtaining a judgment in his favor in a civil action.

*Art. 6.—Of the damages.*

2272. The party aggrieved must have sustained damages to entitle him to recover for a malicious prosecution; but then the bare possibility of damages will be sufficient to sustain the action.

A man may be impaired in his person, his reputation, his estate, and his relative rights. If he has been maliciously accused of a crime, a prosecution commenced against him, and he has been cast into prison, the offence is complete.<sup>(a)</sup> And although he has been left at liberty, and his character has been unstained by the proceeding, as where he has been indicted for a trespass, which is not indictable, yet if he necessarily incurs expenses to defend himself from the charge, he has a right to recover for such loss. And if a master loses the services and assistance of

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(a) *Saville v. Roberts*, Carth. 416.

his domestic, in consequence of a vexatious suit, he may claim a compensation.

When a party sustains damage resulting from a civil action, prosecuted in a court of competent jurisdiction, the only detriment the party can sustain is the imprisonment of his person, or the seizure of his property; for as to all expenses he may be put to, this, in contemplation of law, has been fully compensated to him by the costs adjudged.

#### 7. Of the remedy.

2273. The remedy for a malicious prosecution is an action on the case, to recover damages for the injury sustained.

The damages which are to be thus recovered are general or special. *General damages* are such as the law implies to have accrued from the act of the malicious prosecutor, and the party aggrieved is not required to specify or prove what injury he has sustained.(a)

2274. *Special damages* are such as really took place, and are not implied by law; these are superadded to general damages, arising from an act injurious in itself. To constitute special damages the legal and natural consequence must arise from the tort, and not be a mere wrongful act of a third person, or a remote consequence.

#### SECTION 4.—OF INJURIES TO PERSONAL LIBERTY.

2275, By *personal liberty* is meant the independence in our actions of all other will than our own.(b) The infraction of personal liberty has ever been regarded as one of the greatest personal injuries. The injuries

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(a) 1 Chit. Pl. 386; Ham. N. P. 40.

(b) Wolff, Inst. Nat. § 77.

to personal liberty are malicious prosecutions or arrests, already considered in the preceding section, and false imprisonment, which will be the subject of the present section.

§ 1.—Of false imprisonment.

2276. *Imprisonment* is the restraint of a person contrary to his will.(a) It is either lawful or unlawful. When lawful, it is evident it can be no injury to the person arrested for which he can maintain an action.

2277. An unlawful imprisonment, commonly called *false imprisonment*, means any intentional detention of the person of another, not authorized by law.(b) An unlawful confinement or detention in a prison or private house, or even a forcible detention in the street, or the unlawful touching of a person by a peace officer by way of arrest, are false imprisonments.(c) And an unlawful detention of a person who has been arrested, although the first arrest was lawful, amounts to a new arrest, and consequently it is a false imprisonment.(d)

False imprisonment is frequently the consequence of an arrest under an illegal or void process. A distinction must be made between arrest under legal and under illegal process.

When the process is *regular* and issued out of a court of competent jurisdiction, it is a complete justification to the ministerial officer who has been called upon to execute it, for he is not to judge of the regularity of the process, and he is bound to execute it at his peril; for example, when an execution was issued on a satisfied judgment; but in such case, the plaintiff would not be protected by the writ, for it was he who put it in

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(a) 2 Inst. 589; Baldw. 239, 600.

(b) *Johnson v. Tompkins*, Baldw. 571.

(c) Bac. Ab. Trespass, D 3.

(d) *Withers v. Henley*, Cro. Jac. 379.



motion, and he was then a wrong doer.(a) And although a constable would be protected by an alias execution issued by a justice of the peace, after the debt had been paid under the first, the justice, as well as the plaintiff, would be liable, although the plaintiff had represented that the first execution was lost.(b)

When the process is *wholly* void for want of jurisdiction, none of the parties who issued it, or put it in motion, can be protected under it. A tribunal proceeding under special or limited powers, decides at its peril; and if the court had not jurisdiction, the judges, the attorney, and the party will be liable to an action for false imprisonment, when the defendant has been arrested under its process.(c) Even a ministerial officer will be liable if it appear on the face of the process that the court had no jurisdiction.(d)

In those cases where the process has been *misapplied* as to the person intended to be imprisoned; as for example, where process is issued against A B, and, under it, C D is arrested, the latter may bring suit not only against the plaintiff who authorized the arrest, but also against the ministerial officer, for a command in the writ to arrest A B, cannot justify the arrest of C D.(e)

#### § 2.—Remedies for false imprisonment.

2278. The most efficacious and prompt remedy for false imprisonment, is the writ of *habeas corpus*. This is the best calculated to remove the injury, and to obtain the liberty of the party aggrieved. This celebrated writ, which has been the boast of English

(a) *McGuinty v. Herrick*, 5 Wend. 240.

(b) *Lewis v. Palmer*, 6 Wend. 367.

(c) *Cable v. Cooper*, 15 John. 152.

(d) *Smith v. Shaw*, 12 John. 257; *Savacool v. Boughton*, 5 Wend. 170.

(e) *Bac. Ab. Trespass, D*; 2 *Roll. Ab. 552, (O.)* pl. 5.

lawyers, is an imitation of the interdict of the Roman law, *de homine libero exhibendo*. When a freeman was restrained of his liberty by another, contrary to good faith, the prætor ordered by his interdict that such person should be brought before him, that he might be liberated.(a)

2279. A person who has been unlawfully imprisoned has also a remedy by action, against all who have been active in procuring his imprisonment, unless they are justified by the process of a superior officer.

When the process is *wholly* void, or it has been *misapplied* by arresting the wrong person, the party injured may maintain trespass; when the imprisonment is under color of *regular criminal or civil process*, the remedy is by an action on the case; provided that in this latter case, there was no *probable cause* for instituting the proceedings, and, in general, the acquitted party will be required to prove that there was no such probable cause.

## CHAPTER II.—OF INJURIES TO THE RELATIVE RIGHTS.

2280. The injuries to the relative rights of persons, are those which affect, 1, husband and wife; 2, parent and child; 3, guardian and ward; 4, master and apprentice; 5, employer and employed.

### SECTION 1.—OF INJURIES TO THE RELATIVE RIGHTS OF HUSBAND AND WIFE.

2281. There must in general be, or presumed to be, a legal marriage subsisting between the parties, in order to entitle them to those relative rights which

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(a) Dig. 43, 29, 1. The form of the interdict was "*quem liberum dolo malo retines exhibens*." I order that you bring before me the free person whom you retain in bad faith.

subsist between husband and wife, the violation of which is an injury.

§ 1. Rights of the husband.

2282. The injuries which violate a man's rights as husband, are those which affect him principally, committed upon the wife; and those which affect the wife principally, and are consequentially tortious toward him.

2283.—1. He has an interest in her fidelity; criminal conversation or adultery with her, renders a woman for the future more or less unfit to discharge her relative duties, and so the interests of her husband are deteriorated by their non-performance.

The husband may, however, at his pleasure reinstate the adulteress in her former relation; and, as a second adulterer, by still further debasing her moral principles, renders her less capable to fulfil her duties, it follows that his offence is injurious to the husband as well as the first, different from it, in the inconvenience it occasions, only in degree. So if the illicit intercourse has been carried on between the wife and several persons, during the same period, the husband having received an injury from each, is entitled to a compensation from each.(a)

Even when the woman is a common prostitute, if her course of life is not suffered willingly by her husband, he may have an action for adultery with her; but any connivance on his part will deprive him of a right of action, as, in that case, he would receive no injury, *volunt non fit injuria*;(b) and when his conduct has been censurable, in not taking a proper care of the morals of his wife, he will be entitled only to diminished damages.

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(a) *Gregson v. McTaggart*, 1 Campb. 415.

(b) 4 T. R. 657. See Shelf. on Mar. & Div. 449.

2284.—2. An injury committed by a third person on the wife's person, is an injury to the husband. For such injury the husband and wife must join in an action for the recovery of the damages; but when the injury is such that the husband receives a separate damage or loss, as if, in consequence of a battery, he has been deprived of her society or been put to expense, he may bring a separate action in his own name; and, for slander of his wife, when the words are not actionable in themselves, and the husband has received special damages, he must sue alone.(a)

§ 2.—Rights of the wife as such.

2285. A wife has some rights against third persons, and even against her husband, for injuries committed upon her person. But in all cases when she sustains an injury, her husband must be joined with her in bringing a civil action to redress the wrong.

Contrary to the general rule that a wife cannot sue her husband, for her protection the law allows her, when by the husband's bad usage or threats, her life is put in danger, to obtain sureties of the peace, by applying to a proper officer. And, generally, she may compel him to pay her a just alimony, when, by his desertion or cruelty, he has forced her to separate from him. The courts will also compel the husband to pay reasonable fees to her counsel in all such cases.

2286. Though in general, the husband has the lawful custody of the wife, yet if she be unlawfully restrained, she may sue out a writ of *habeas corpus* to obtain her liberty.

2287. We have seen that when the wife commits adultery, the husband has an action against her paramour for the injury done to him. In this respect the law does not give a just reciprocity to the wife. She

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(a) 1 Lev. 140; Russell v Corne, 1 Salk. 119.

has no remedy for the injury done to her by the husband's infidelity; for this, if for no other reason, that she cannot sue alone, and the husband cannot recover damages, jointly with his wife, against the partner of his guilt.

SECTION 2.—OF INJURIES TO THE RELATIVE RIGHTS OF  
PARENT AND CHILD.

2288. The rights between parent and child result from the legality of the marriage of the parents. When this kindred is established or presumed, the parties have rights and are bound by reciprocal duties to each other.

§ 1.—Of injuries to the relative rights of parents.

2289. A father is the natural guardian of his children, and he has therefore an interest in their persons, that, at any age, he may defend them from all injuries, even by forcible means. He is entitled to their custody, and any act, by which he is unlawfully deprived of it, is a wrong to him. And when he has sustained special damages in consequence of the beating of his child, as where he has been compelled to employ a physician or a nurse, he may maintain an action to recover damages. But this right is limited to the infancy of the child, and before he becomes of age, for, after that period, the father can recover no damages for an injury to him.

2290. For the seduction of his female child, a father has no right, *as such*, to recover damages, because, unless she fills the capacity of a servant at the time of the seduction, the law presumes he sustained no damages, and it gives no compensatory remuneration for the feelings of the father; (a) for, to the discredit

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(a) *Flemington v. Smithers*, 2 Car. & Payne, 292; S. O. 4 B. & C. 660; S. O. 7 Dowl. 133. See *Seager v. Sligerland*, 2 Caines, 219.

of the law be it said, it gives no direct remedy to the unfortunate woman's parents.

2291. When a master sues for the *seduction* of his servant, not being the parent of the servant, he must prove the contract of hiring, for on that rests his whole case; but when, in addition to the relation of master and servant, that of parent and child also exists, the rule of the common law is so far relaxed, that employment in acts of service is equivalent to a state of servitude; and, in such case, by reason of the plaintiff's paternity, proof of no more than slight and desultory acts of service when the child had come of age, will be sufficient evidence of hiring. Still, however, a state of servitude of some sort must be established.(a)

2292. Another injury to the relative rights of a parent, is the *abduction* of his children; for this he also assumes the character of master and servant. The remedy is by action on the case, *per quod servitium amisit*. In such case, as in that of seduction, the slightest evidence is sufficient to support the relation of master and servant.(b) The father of a woman who has an illegitimate child, stands toward such child *in loco parentis*, and may sustain an action for its abduction.

§ 2.—Of injuries to the relative rights of children.

2293. Though the father has the control of his children, and may correct them for their good, yet if by excessive beating he endangers their lives or their health, the law will interfere, and the father may be punished for an assault and battery, or if he imprisons them, the courts will discharge them on a *habeas corpus*. Happily but few cases of such cruelty, so revolting to our nature, can be found.

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(a) *Moritz v. Garnhart*, 7 Watts, 302.

(b) 7 Watts, 302, 303.

If a father by his cruelty and abuse induces an infant child to escape from him, for fear of personal violence and abuse, and he cannot with safety return to live with him, he gives by such act, authority to a stranger to furnish such a child necessary support and education, and he will be liable for the amount so expended for him.(a)

SECTION 3.—OF INJURIES TO THE RELATIVE RIGHTS OF  
GUARDIAN AND WARD.

2294. The rights of guardian and ward much resemble those of parent and child. The guardian is considered as standing in the place of the father, and of course the relative powers and duties of guardian and ward correspond in a great measure to those of parent and child. In some respect they differ; the father is entitled to the services of his child, and is bound to support him; the guardian is not entitled to the services of the ward, and is not bound to maintain him, out of his own estate.

For an injury done to the ward by a stranger, the guardian may bring a suit in the name of the child, to recover damages.

SECTION 4.—OF INJURIES TO THE RELATIVE RIGHTS OF  
MASTER AND APPRENTICE.

2295. To create the relation of master and apprentice, there must be a lawful contract entered into between the parties. This, as has been explained in another place,(b) should be by deed. There are cases in which the master cannot sue for the abduction of the apprentice, unless the relation between them has been duly constituted;(c) though, in general, a third

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(a) *Staunton v. Wilson*, 3 Day, 37.

(b) *Ante*, n. 402.

(c) *Gye v. Felton*, 4 Taunt. 876.

person cannot protect himself from liability to an action for seducing away or detaining a servant, *per quod servitium amisit*, by setting up any formal objection to the contract of apprenticeship, or hiring, while the service was continuing, and the apprentice himself is liable to be punished for running away, although the indenture be voidable, as he ought to have first avoided it by a reasonable notice.(a)

§ 1.—Of injuries to the rights of the master.

2296. The master has such an interest in his apprentice that he may defend him with force,(b) and he may maintain an action for the battery of the apprentice, or for debauching him, or for any other injury to him, if any loss of service ensues.

The most common injuries to the master are the seduction of his female servants or apprentices; the master has an action against the seducer, though not directly and ostensibly for the seduction, but because she is disabled, by the act of the defendant, from performing those services which she owed to her master.

This rule applies to all kinds of masters and every variety of servant, so that when a father sues for the seduction of his daughter, he must assume the less endearing name of master, to entitle him to a compensation; and if it cannot be proved that she has filled that office, the action cannot be sustained.(c) But the least service which she may have performed will be sufficient, as, milking the cows;(d) it his, however, requisite that a specific contract or acts of service be established.

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(a) *Ashcroft v. Bertles*, 6 T. R. 652. See 2 H. Bl. 511.

(b) *Ante*, n. 408.

(c) *Grinnell v. Wells*, 7 Man. & Gr. 1033; *Dean v. Peal*, 5 East, 45; *Postlethwaite v. Parkes*, 3 Burr. 1879.

(d) *Bennet v. Allcott*, 2 T. R. 168. See *Moran v. Dawes*, 4 Cowen, 412.



§ 2.—Of injuries to the rights of the apprentice.

2297. Apprentices are a very valuable class of citizens, who in time become important members of society, and well deserving the special care and protection of the law. They are entitled to good treatment from their masters in return for their obedience, submission and faithfulness; if, therefore, the master withhold proper maintenance from the apprentice, or proper instruction, the magistrates and courts will in general compel him to do justice; provisions to compel the master in such cases to fulfil his engagement are to be found in the statutes of most of the states.

And if a master, by cruelty, endanger the life of his apprentice, or, by his bad example, expose his morals to corruption, the apprentice will be discharged from his indentures.

SECTION 5.—OF INJURIES TO THE RELATIVE RIGHTS OF THE EMPLOYER AND EMPLOYED.

2298. When the relation of employer and employed exists by a valid contract, and the master or employer is entitled to the services of the servant or person employed, for a definite time, rights and duties exist on both sides, and when these are violated they are injuries.

§ 1.—Of injuries to the relative rights of the employer.

2299. As the master is entitled to the services of his servant, it is evident that when an injury is committed against the servant, by which the master is damnified, the latter may have an action for the injury done to him. Enticing a workman who is employed by another for a definite time, before such time has expired, is an injury committed to his employer,

and this though he be but a journeyman.(a) And if a servant leave his master's employment, without just cause, and a third person retain him, and knowingly harbor him, so as to deprive the master of his services, an action lies.(b) But a person entitled to the services of another who stands by and permits a third person to avail himself of such services, without interposing a claim, or giving notice of his right, cannot maintain an action for such services, the law requiring every one who claims, to recover for the tortious acts of another, that he should himself come with clean hands, for if he has connived or assented to the wrong, he has not been injured.(c)

For a battery or other unlawful injury committed upon a servant, when the master sustains special damages, the master as well as the servant may bring an action, and each shall recover damages, for both have sustained an injury; the servant in his person, and the master in the loss of his servant's labor.(d)

A master may be injured also by the acts of his servants, either toward himself, or with regard to third persons. When an injury arises to a third person from the negligence of a servant while in the lawful and authorized employment of the master, the latter is responsible for the consequences.(e) Among the numerous cases of this kind, only a few examples need be mentioned: where, by unskilful management of a raft, a servant committed an injury to another on the river, the owner of the raft was held responsible.(f) A driver, who by carelessness injures a

(a) *Hart v. Albridge*, Cowp. 54.

(b) *Bac. Ab. Master and Servant*, (O); *Seidmore v. Smith*, 13 John. 322. See *Boston Glass Manufactory v. Binney*, 4 Pick. 425; *Dubois v. Allen*, Anthon, 94.

(c) *Demyer v. Souzer*, 6 Wend. 436.

(d) *Bac. Ab. Master, etc.*, (P); *Woodward v. Washburn*, 3 Denio, 369.

(e) *O'Connell v. Strong*, Dudl. R. 265; *Drayton v. Moore*, Dudley R. 268; *Harris v. Mabry*, 1 Iredell, 240.

(f) *Shaw v. Reed*, 9 Watts & Serg. 72.

passenger, by upsetting his carriage, is guilty of such negligence as to make his employer responsible for the injury. (a) The master is made responsible in these cases because he is bound to employ none but careful persons, and he is a guarantor of their conduct while they are in his lawful service.

But when the servant commits a tort, without any authority, express or implied, of the master, the latter is not responsible to third persons for such wrongful act, and the servant is alone answerable for the consequences. (b)

Indeed, in some cases, the master is responsible not only civilly but criminally for the wrongful acts of his servants; as where a baker's servant mixed poisonous substances with the bread, the master was held liable to a civil action, and also to an indictment; and he is similarly responsible for the publication of a libel by his servant in the course of his business. (c)

§ 2.—Of injuries to the relative rights of the employed.

2300. The servant, although bound to obey the lawful commands of the master, cannot be compelled to do so by corporal punishment; and if the master beat him, it is a trespass. The right of correction does not extend to servants in husbandry, or to journeymen in trades, or to persons who are merely hired, and are not in the capacity of apprentices.

There is, however, an exception to this general rule, founded on public policy. A sailor may be punished by corporal punishment, and, unless it be excessive, or without cause, the master of a vessel may justify a battery on a sailor. But when it is excessive, or

(a) *Maury v. Talmadge*, 2 McLean, 157; 2 Stark. R. 37.

(b) *Puryear v. Thompson*, 5 Humph. 397; *Campbell v. Staist*, 2 Murph. 389. See the *State v. Walker*, 4 Shepl. 241; *Earle v. Hall*, 2 Metc. 353; *Wright v. Weatherly*, 7 Yerg. 367.

(c) *King v. Dixon*, 3 M. & S. 11; *Rex v. Walter*, 3 Esp. 21.

cruel, or without cause, such battery will render the master of the ship, when it has been committed by his order, liable to an action.

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## TITLE II.—OF WRONGS TO PERSONAL PROPERTY AND RIGHTS.

2301. In another place (*a*) we have examined the nature of personal property; its division into chattels real and chattels personal, the nature of chattels personal, or their being in possession or not in possession; the right to them being absolute or qualified; of the time when personal property may be enjoyed; the mode of acquiring and losing title to it; and the number and connection of the owners. It now remains to inquire what injuries may be committed to it. For this purpose this title will be divided into six chapters, which will treat of injuries; 1, to personal property in possession; 2, to the rights of remainder men and reversioners; 3, to the rights of joint tenants and tenants in common; 4, to things not tangible, as patent rights and copy rights; 5, deceits and misrepresentations; 6, to injuries arising from neglect of duty.

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### CHAPTER I.—OF INJURIES TO PERSONAL PROPERTY IN POSSESSION.

2302. Injuries to personal property in possession, may occur in several ways: 1, by an illegal taking; 2, by embezzlement; 3, by damaging it; 4, by false pretenses.

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(*a*) B. 2, t. 1.

## SECTION 1.—OF INJURIES BY ILLEGAL TAKING.

2303. The possession of personal property belongs to the owner, and any unlawful taking of such property is a wrong to him. The taking of property is either felonious or not felonious.

The *felonious* taking of personal property and carrying it away out of possession of the true owner, is the crime of larceny. This falls under the cognizance of the criminal law.

The *tortious* taking of property will alone be considered in this place. The act of seizing and detaining personal property unlawfully is a *trespass*—a trespass being an unlawful act committed with violence, *vi et armis*, to the person, property, or relative rights of another.

For such wrongful taking, an action of trespass may be maintained, or the party injured may bring an action of trover and conversion, and such wrongful taking will be evidence of conversion; (a) these two actions being concurrent in such cases. Replevin may also be maintained. (b)

When the property taken has been unlawfully converted, and changed into another species, the title of the former owner is by this means destroyed; as where grain, wrongfully taken, was converted into whiskey, the whiskey was held to belong to the manufacturer, (c) he being liable to the owner of the grain for its value.

## SECTION 2.—OF EMBEZZLEMENT.

2304. Another kind of injury to personal property, is by *embezzlement*, which is the fraudulent removing and secreting of personal property with which the

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(a) 2 Saund. 47, k.

(b) 1 Ohit. Pl. 158.

(c) Silsbury v. McCoon, 6 Hill, 425. Vide ante, n. 505.

party has been intrusted, for the purpose of applying it to his own use. This kind of breach of trust was not punishable criminally at common law, but it is so punished by the local laws of perhaps all the states of the Union.

2305. By acts of congress, the embezzlement of public property is punishable by fine and imprisonment.<sup>(a)</sup>

When the embezzlement of a part of the cargo takes place on board of a ship, either from the fault, fraud, connivance, or negligence of any of the crew, they are all bound to contribute to the reparation of the loss in proportion to their wages. When the embezzlement is fixed on any individual, he is solely responsible; when it is made by the crew, or some of the crew, but the particular offender is unknown, and from the circumstances of the case, strong presumptions of guilt apply to the whole crew, all must contribute. This is a rule of policy to prevent combinations among the crew, by which one might take property which they might afterward share together.

The presumption of innocence is always in favor of the crew, and the guilt of the whole crew, or of some one or more of them, must be established beyond all reasonable doubt, before they can be required to contribute.<sup>(b)</sup>

### SECTION 3.—OF INJURIES TO PERSONAL PROPERTY BY DAMAGING IT.

2306. By *damage to personal property*, is understood the loss caused by one person to another's property, either with the design of injuring him, or by negligence or carelessness, or inevitable accident. The

(a) Act of April 30, 1790, s. 16; Act of April 20, 1818, s. 5; Act of March 4, 1825, s. 24.

(b) *Speer v. Pearson*, 1 Mason, 104; *Thompson v. Collins*, 4 Bos. & Pull. 347; *Lewis v. Davis*, 3 John. 17; 1 Marsh. Ins. 241.

injuries to personal property are of two kinds, namely, criminal, or merely tortious without any criminality. The latter will alone be here made the subject of our inquiries. Let us consider, 1, what property may be damaged; 2, by whom; 3, in what manner; 4, when the damage may be justified or excused.

§ 1.—What property may be damaged.

2307. The property which is subject to illegal or tortious damages, must be tangible, for choses in actions and incorporeal rights cannot, in this sense, be damaged by any wrongful acts of others.

There can be no damage done where the party who complains of an injury had no property in the thing damaged; animals *feræ naturæ*, entirely unreclaimed, are not the property of any one; if a damage is done to them, no action can be sustained on that account, although they may have been injured on the plaintiff's land. If the plaintiff has any cause of action, it may be for trespassing on the land, but not for killing or damaging such animal there.(a)

But where a reclaimed animal has no such intrinsic value that he can be the subject of larceny, as a dog,(b) yet the owner has such property in him that he may maintain trespass for an unlawful injury to him; "for a man may have property in some things which are of so base a nature that no felony can be committed of them, as of a blood-hound or mastiff."(c)

§ 2.—By whom the property may be damaged.

2308. The damage to personal property may be committed by bailees or others having the legal possession, or by strangers.

(a) *McConico v. Singleton*, 2 Rep. Con. Ct. 244; *Broughton v. Singleton*, 2 N. & M. 338; *Bac. Ab. Trespass*, (E).

(b) 4 Bl. Com. 236; *Findlay v. Bear*, 8 S. & R. 571.

(c) 12 H. 8, 3; 18 H. 8, 2; 7 Co. 18, a.

## § 3.—Of the manner of committing the damage.

2309. Though the injury be the same, yet there is a great difference in the remedy, according to circumstances. When damage has been done by a third person, not having any legal or other possession, and the injury is direct, immediate, and committed with force, in fact, or implied in law, and the plaintiff was in possession, an *action of trespass* is the proper remedy; on the contrary, when the plaintiff was not in possession, the proper remedy is an *action on the case*. When the damages are consequential, or not committed with force, the remedy is an action on the case, whether the plaintiff was or was not in possession.

The damage may be caused by the defendant, or his authorized agent, or even by his animals, and he is responsible, in these last cases, as if he had himself committed the injury; subject to this distinction, that where the wrong is committed by his agent, without his express command, or by his animals, without any fault or action on his part, that he would not be liable for vindictive damages.

2310. Many cases occur in practice when it is difficult to say who ought to be responsible. These are cases of collision of ships, when one or both are injured. There are four possibilities under which an accident of this sort may occur.

1. It may happen without any blame being imputable to either party, as, when the loss is occasioned by a storm, or any other *vis major*; in that case the loss must be borne by the party on whom it happens to fall, the other not being responsible to him in any degree.

2. Both parties may be to blame, as, when there has been a want of due diligence or of skill on both sides; in such cases the loss must be apportioned



between them, as having been occasioned by the fault of both of them.(a)

3. The suffering party may have been the sole cause of the injury, then he must bear the loss.

4. It may have been the fault of the ship which ran down the other; in this case the injured party would be entitled to an entire compensation from the other.(b) The same rule applies to steamboats.

5. Another case has been put, namely, when there has been some fault or neglect, but on which side the blame lies is inscrutable, or the evidence leaves it in a state of uncertainty. In this case it does not appear to be settled whether the loss shall be apportioned or borne by the suffering party. Opinions on the subject are divided.

§ 4.—When the tortious act can be justified.

2311. The right of property being sacred, no one of his own accord can meddle with the goods of another, unless it be to rescue them from inevitable destruction, or to preserve his own from a misfortune, about to be occasioned by those of the other; as, where an animal, the property of one man, is chased or attacked by that of another, so that the life or safety of the former cannot be preserved unless by killing or restraining the other, it may be done.(c) A dog caught in the act of killing sheep, may therefore be killed to prevent his doing further mischief.(d)

SECTION 4.—OF INJURIES BY FALSE PRETENCES.

2312. By *false pretences* is meant any untrue representations and statements, made with a fraudulent

(a) *Simpson v. Hand*, 6 Whart. 311.

(b) 2 *Dodson*, 83, 85; *Strout v. Foster*, 1 How. U. S. 89.

(c) *Bac. Ab. Trespass*, (E).

(d) *Barrington v. Turner*, 3 Lev. 28; *Cro. Jac.* 45.

design to obtain money, goods, wares or merchandise, with intent to cheat.

This is a misdemeanor punishable by the criminal law, in most of the states of the Union. As a false pretence is not a felony, the civil remedy is not suspended, and the party may maintain replevin, detinue or trover.

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CHAPTER II.—OF INJURIES TO THE RIGHTS OF REVERSIONERS AND REMAINDER MEN.

2313. When a man is the absolute or general owner of personal property, and he is entitled to immediate possession, notwithstanding it is out of his custody, yet in contemplation of law he is actually possessed, and this is the meaning of the trite maxim, that "absolute property in personalty draws to it the possession."<sup>(a)</sup>

In general this right suffices, and the general owner of a personal chattel, though he never had the actual possession, may maintain trover or *trespass* for an injury, as if he were in actual possession.<sup>(b)</sup>

But when the general owner of property has not the right of possession, as where by the terms of the grant or bequest to him, he is to be entitled to it after the death of a person living, or when, on any other ground, his right of possession is only in remainder or reversion, or where he has parted with the right of possession, as by letting furniture, for an unexpired term, then an injury to the chattel is not immediate to him, but consequential only, and for this reason he cannot maintain trespass or trover for such a wrong, but he must declare specially in case for the injury to his reversionary interest.

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(a) *Burser v. Mustin*, Cro. Jac. 46.

(b) 2 Saund. 47, and notes.

## CHAPTER III.—OF INJURIES TO PROPERTY HELD IN COMMON.

2314. When personal property is held by several persons in common, and an injury is committed to it by a stranger, he is liable to the owners as if it was held in severalty.

As each of the owners has as good a right to use the chattel as the other, it is clear that neither can maintain trover or trespass against the other, although the latter may have taken the exclusive use of their joint property ;(a) but when one of the joint owners sells or destroys the chattel, the other may maintain such action ;(b) as when the wheat of Peter was mixed with that of Paul, by consent of both parties, and Paul sold the whole, it was held that they were tenants in common, and that Paul was liable to Peter in trover.(c) The reason for this distinction is this, that by a sale or destruction of the joint property there is a severance of the rights.(d)

## CHAPTER IV.—OF INJURIES TO THINGS NOT TANGIBLE.

2315. The things not tangible to which an injury may be committed are of three kinds, namely: copy rights, the publication of manuscripts, and patent rights.

## SECTION 1.—OF INJURIES TO COPY RIGHTS.

2316. When treating of the nature of property, we

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(a) *Farr v. Smith*, 9 Wend. 338; *Fightmaster v. Beasley*, 7 J. J. Marsh. 410; *Gilbert v. Dickerson*, 7 Wend. 449; *Com. Dig. Estate, K 8*; *Dain v. Cowing*, 9 Shepl. 347; *Hurd v. Darling*, 14 Verm. 214; *Rank v. Rank*, 5 Penn. St. R. 211; *St. John v. Standing*, 2 John. 468; *Cowan v. Buyers*, Cooke, 53. See *Wilson v. Reed*, 3 Wils. 175.

(b) *Hyde v. Stone*, 7 Wend. 354; *Herrin v. Eaton*, 1 Shepl. 193; *Weld v. Oliver*, 21 Pick. 559; 9 Wend. 338; *White v. Osborn*, 21 Wend. 72.

(c) *Newlin v. Colt*, 6 Hill, 461.

(d) *Hinds v. Terry*, Walker, 80.

took a short view of the manner in which a copy right may be obtained, and for what it will be granted. It remains to consider what injuries may be committed against this right, and what redress the owner has for its infringement.

2317.—1. The injury to a copy right consists in unlawfully printing, publishing, or importing, or causing to be printed, published or imported any copy of the book, map, chart, musical composition, engraving, cut, print, or other thing for which the copy right is lawfully secured.

2318.—2. The remedy for a violation of a copy right is given by act of congress; it is by action of debt in any court of competent jurisdiction. The penalty is "fifty cents for every sheet which may be found in defendant's possession, either printed or printing, published or imported, or exposed to sale contrary to the intent of this act; the one moiety thereof to such legal owner of the copy right, and the other to the use of the United States."

2319.—3. The violation of the copy right to a map, chart, musical composition, print, cut, or engraving, or any part thereof, renders the offender liable to forfeit the plate or plates on which such map, chart, musical composition, engraving, cut or print shall be copied, and also all and every sheet thereof so copied or printed, to the proprietor of the copy right thereof; and shall further forfeit one dollar for every sheet of such map, chart, musical composition, print, cut, or engraving, which may be found in his or their possession, printed or published, or exposed to sale, contrary to the true intent and meaning of the act; the one moiety to the proprietor, and the other to the use of the United States.

SECTION 2.—OF THE UNLAWFUL PUBLICATION OF AN  
AUTHOR'S MANUSCRIPTS.

2320. The act of congress provides that any person

who shall print or publish any manuscript whatever, without the consent of the author or proprietor, obtained in writing, signed in the presence of two or more witnesses, (if such author or proprietor be a citizen of the United States, or resident therein,) shall be liable to suffer and pay to the author or proprietor, all damages occasioned by such injury, to be recovered by a special action on the case, founded upon this act, in any court having cognizance thereof; and the several courts of the United States empowered to grant injunctions, to prevent the violation of the rights of authors and inventors, are thereby empowered to grant injunctions in like manner, according to the principles of equity, to restrain such publication of any manuscript as aforesaid.

### SECTION 3.—OF INJURIES TO PATENT RIGHTS.

2321. By authority of the laws of the United States, patents are granted to certain descriptions of persons there mentioned, for various purposes.

2322.—1. It is enacted by the act of July 4, 1836, s. 6, that any person or persons having discovered or invented any new or useful art, machine, manufacture or composition of matter, or any new and useful improvement on any art, machine, manufacture, or composition of matter, not known or used by others before his or their discovery or invention thereof, and not at the time of his application for a patent, in public use, or on sale with his consent or allowance, as the inventor or discoverer, shall be entitled to a patent.

2323.—2. And by the act of August 29, 1842, s. 3, it is provided that a patent shall be granted to "any citizen of the United States or alien having resided one year therein, and taken the oath of his intention to become a citizen, who, by his own industry, genius, efforts, and expenses, may have invented or produced any new and original design for a manufacture,

whether of metal or other material, or any new and original design for the printing of woollen, silk, cotton, or other fabrics, or any new and original design for a bust, statue or bass relief, or composition in alto or basso relievo, or any new and original impression or ornament, or to be placed on any article of manufacture, the same being formed in marble or other material, or any new and useful pattern, or print, or picture, to be either worked into, or worked on, or printed, or painted, or cast, or otherwise fixed on, any article of manufacture, or any new and original shape or configuration of any article of manufacture, not known or used by others before his invention or production thereof, and prior to the time of his application for a patent therefor."

2324. For the violation of such a patent right, the act of congress of July 4, 1836, s. 14, provides that whenever in any action for damages for making, using, or selling the thing whereof the exclusive right is secured by patent, a verdict shall be rendered for the plaintiff in such action, it shall be in the power of the court to render judgment for any sum above the amount found by such verdict, as the actual damages sustained by the plaintiff, not exceeding three times the amount thereof, according to the circumstances of the case, with costs; and such damages may be recovered by action on the case, in any court of competent jurisdiction, to be brought in the name of the person interested, whether as patentee, assignee, or grantee, of the exclusive right within or throughout a specified part of the United States.

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#### CHAPTER V.—OF INJURIES CAUSED BY DECEIT.

2325. The owner of personal property may be injured by the deceit of another, whether the personal

chattels be in possession or not in possession, corporeal or intangible.

*Deceit* is a fraudulent misrepresentation or contrivance by which one man deceives another, who has no means of detecting the fraud, to the injury and damage of the latter. If this definition be analyzed, it will be found, 1, there must be a fraudulent misrepresentation; 2, inability in the person injured to prevent the fraud; 3, a damage must have ensued: these subjects will be examined in three sections, and in a fourth will be considered the remedy for the injury.

#### SECTION 1.—OF THE FRAUDULENT MISREPRESENTATION.

2326. From the very terms of the definition of deceit, it appears there must be *fraud* or the intention to deceive, for this is the very essence of this injury. If the party making the representation, was himself mistaken, no degree of blame can be imputed to him, and, in that case, the principal feature in almost every injury, namely, a default, in a greater or lesser degree, on the side of the defendant, would be wanting. In general, the representation must be *malò animo*; but whether the party making it, is himself to gain by it, is wholly immaterial,<sup>(a)</sup> nor is it necessary that the intent should be to defraud him to whom such false and fraudulent misrepresentation is made.<sup>(b)</sup> And when such a false representation is made, the party making it will not be shielded from responsibility by adding that he gives the information *without prejudice to himself*.<sup>(c)</sup>

2327. Deceit may not only be by asserting a falsehood deliberately to the injury of another, as that Paul is in flourishing circumstances, whereas he is in truth

(a) *Paasley v. Freeman*, 3 T. R. 51.

(b) *Boyd v. Browne*, 6 Penn. St. R. 310.

(c) *Eyre v. Dunsford*, 1 East, 318.

insolvent; that Peter is an honest man, when he knew him to be a rogue; that property real or personal possesses certain qualities, or belongs to the vendor, whereas he knew these things to be false; but by *any act or demeanor* which would naturally impress the mind of a careful man with a certain belief.(a)

Therefore, if one whose manufactures are of a superior quality, distinguishes them by a particular mark, which facts are known to Peter, and Paul counterfeits this mark, and affixes it to manufactures of the same description, but not made by such person, and sells them to Peter as goods of such manufacture, this is a deceit.

2328. In many cases the deceit or misrepresentation takes place in contracts, but though in some measure connected with contracts, yet the injury arises from such deceit, for it is that which has caused a damage to the party injured.

2329. This kind of misrepresentation may be expressed, as where a person assuming to accept a bill for another, represents that he is authorized so to do, and the holder in consequence retains the bill, sues the supposed acceptor, and is nonsuited and obliged to pay the costs, he may afterward sue the pretended agent, for the amount of the bill and the costs, though the jury negative the fraud.(b) Again, when a person deceitfully asserts that the property of another is sound, and encourages the plaintiff to buy it, it is a deceit.(c) So a seller is liable in an action for a deceit, for false representations as to the title and quality of a chattel sold by him.(d) The false representation of a person as a man of credit, when intentional, renders the party representing, guilty of deceit, and he will be liable for the loss, when in consequence of it, the

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(a) Hart v. Tallmadge, 2 Day, 382.

(b) 3 Bar. & Adol. 114.

(c) Irwin v. Skerrill, 1 Tayl. 1.

(d) Setzar v. Wilson, 4 Iredell, 501; Stevens v. Fuller, 8 N. H. Rep. 463.



plaintiff has trusted such person, and has not been able to recover from him, on account of his insolvency.(a) But where the person making the representation is honestly mistaken, there is no deceit.(b)

2330. Misrepresentations arising out of contracts may also be implied, as where the vendor has a knowledge of the defects of a commodity, which cannot be obvious to the buyer, and does not disclose it, or, if apparent, uses some artifice to conceal it, he becomes guilty of a fraudulent misrepresentation, for there is an implied condition in every contract that the parties to it act upon equal terms, and the seller is presumed to have assured or represented to the purchaser that he is not aware of any secret deficiencies by which the commodity is impaired, and that he has no advantage which the purchaser himself does not possess.(c)

SECTION 2.—OF THE INABILITY IN THE PERSON INJURED TO PREVENT THE FRAUD.

2331. It is not sufficient that the plaintiff should be unaware of the misrepresentation, he must have no means of detecting the fraud, for if he has such means, his ignorance will not avail him; in that case he becomes the willing dupe of the other's artifice, and *voluntarius non fit injuria*. The law lends its aid to him who has used ordinary vigilance and discretion, and when, notwithstanding these, he has been deceived, *vigilantibus et non dormientibus serviunt leges*. When he has used all those precautions, which a prudent man would have adopted in the same situation, he has then, but not till then, used all the means of detecting the deceit. If, for example, a man should sell a piece of cloth, asserting that it contained so many yards, and

(a) See *Rumsay v. Lowell*, Anthon, 17; *Tryon v. Whitmarsh*, 1 Metc. 1.

(b) *Haycraft v. Creasy*, 2 East, 92.

(c) See *Stevens v. Fuller*, 8 N. H. Rep. 463; *Hart v. Tallmadge*, 2 Day, 382.

it contained less, the buyer could not complain of the deceit, because he could have measured it himself, and been satisfied of the falsehood of the assertion.(a) And if a horse wanting an eye is sold, and the defect is visible to a common observer, the purchaser cannot be said to be deceived, although sold as a sound horse, for, by inspection, he might discover it; but if the blindness is discoverable only by one experienced in such diseases, and the buyer is an inexperienced person, it is a deceit, provided the seller knew of the defect.

### SECTION 3.—OF THE DAMAGE CAUSED BY THE DECEIT.

2332. It is plain that although there may have been a deceit, if no damage has been sustained by the plaintiff, he cannot recover a compensation for such damages.(b) If, therefore, a person should deceitfully represent that A is worthy of credit, when in fact he was insolvent, and B sold him goods on a credit of six months, and before the money became due, A should become wealthy and then pay the debt, B would have no right to sue the person who recommended A, because he had not been damnified.

### SECTION 4.—OF THE REMEDY FOR A DECEIT.

2333. The remedy for a deceit, unless the cause of action has been suspended or discharged, is by an action of trespass on the case. The injury did not arise *ex contractu*, therefore assumpsit does not lie, and as no force was used, trespass cannot be maintained.

(a) Poph. 143. See *Moore v. Surbeville*, 2 Bibb, 602; 12 East, 632; 4 Taunt. 779; *Farrar v. Alston*, 1 Dev. 69.

(b) *Ide v. Gray*, 11 Verm. 615; *Munroe v. Gardner*, 3 Brevard, 31; 1 Dev. 69; *Tryon v. Whitemarsh*, 1 Met. 1; *Fisher v. Brown*, 1 Tyler, 496; *Fuller v. Hodgdon*, 12 Shepl. (25 Maine,) 243.

## CHAPTER VI.—OF INJURIES ARISING FROM A NEGLECT OF DUTY.

2334. There are three classes of cases where injuries arise from neglect of duty. These relate to, 1, ministerial officers; 2, common carriers; and 3, innkeepers.

## SECTION 1.—WITH RESPECT TO MINISTERIAL OFFICERS.

2335. A ministerial officer may be guilty of neglect to perform his duty in two ways; 1, by permitting a prisoner to escape; and, 2, by a neglect to execute or return his writ.

## § 1.—Of an escape.

2336. An *escape* is the deliverance of a person out of prison, who is lawfully imprisoned, before such person is entitled to such deliverance by law.(a)

There can be no escape, unless there has been a lawful imprisonment. When a man is imprisoned in a proper place, under process of a court having jurisdiction of the case, he is lawfully imprisoned, notwithstanding the proceedings may be irregular;(b) but if the court has no jurisdiction, the imprisonment is unlawful, whether the process be regular or otherwise.(c)

Escapes are divided into, 1, voluntary; 2, negligent; 3, actual; 4, constructive. They are also criminal, but this subject does not fall under this title.

*Art. 1.—Of voluntary escapes.*

2337. A *voluntary escape* is the giving to a prisoner,

(a) *Colby v. Sampson*, 5 Mass. 310; *Lowry v. Barney*, 2 Chipm. 11; *Patten v. Halstead*, Coxe, 277.

(b) *Jones v. Cook*, 1 Cowen, 309; *The State v. Murray*, 3 Shepl. 100.

(c) *Bac. Ab. Escape in civil cases*, A 1; *Austin v. Fitch*, 1 Root, 288.

voluntarily, any liberty not authorized by law.(a) Letting a prisoner, lawfully confined under final process, out of prison, for any, or the shortest time, is an escape, although he afterward returns;(b) and this may be the case, as when he is imprisoned under a *capias ad satisfaciendum*, although the officer may accompany him,(c) unless it be to remove him to a place appointed by law for his being kept, or in obedience to a writ of *habeas corpus*. But if, in the latter case, he went out of the direct road to accommodate the prisoner, it is an escape.(d) When the deviation is to accommodate the plaintiff, the sheriff is not responsible, although the prisoner escapes through his negligence.(e)

2338. The effect of such an escape in a civil case, when the prisoner is confined under final process, is to discharge the debtor, so that he cannot be retaken by the sheriff; but he may be again arrested, if he was confined only on mesne process,(f) and the plaintiff may retake the prisoner in either case.

Another consequence of a voluntary escape, is to make the sheriff responsible for the debt for which the prisoner was confined on final process.(g) This rule is subject to one qualification, namely, that the sheriff shall be allowed to prove that the prisoner was totally insolvent at the time of his arrest, and that the plaintiff shall recover only for the damages he has sustained.(h)

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(a) *Colby v. Sampson*, 5 Mass. 310; *Lowry v. Barney*, 2 Chipm. 11; *Jones v. The State*, 3 Harr. & John. 559; 2 Harr. & Gill. 106.

(b) 1 Roll. Ab. 806.

(c) *Dyer*, 207, pl. 24; *Benton v. Sutton*, 1 B. & P. 24; *Hob.* 202.

(d) 1 Mod. 116; *Wood v. Turner*, 10 John. 420. See *Hassam v. Griffin*, 18 John. 48.

(e) *The State v. Woods*, 7 Mis. 536.

(f) *Cady v. Huntington*, 1 N. H. Rep. 138; *Stone v. Woods*, 5 John. 182.

(g) See *Lash v. Ziglar*, 5 Iredell, 702.

(h) *Shuler v. Garrison*, 5 Watts & Serg. 455; *Patterson v. Westevelt*, 17 Wend. 543; *Smith v. Hart*, 1 Brevard, 146.

But if the plaintiff retakes the prisoner, after an escape, whether voluntary or negligent, he cannot afterward resort to the sheriff; (a) and, upon principle, it would seem that when the prisoner returns, after a voluntary escape, and the plaintiff has assented to consider him in custody at his suit, that the sheriff would be equally discharged.

*Art. 2.—Of a negligent escape.*

2339. A *negligent escape* takes place when the prisoner goes at large, unlawfully, either because the building or prison in which he is confined is too weak to hold him, (b) or because the keeper, by carelessness, lets him go out of prison.

The consequences of a negligent escape are not so favorable to the prisoner confined under final process, as they are when the escape is voluntary, because, in this case, the prisoner is to blame. He may, therefore, be retaken.

*Art. 3.—Of an actual escape.*

2340. The escape is *actual*, when the prisoner in fact gets out of prison and unlawfully regains his liberty. To make an actual escape, it is not requisite that the prisoner should be entirely out of the control of the officer; if he has been allowed, or has obtained such a degree of liberty as is not authorized by law, the escape is complete. (c) And nothing will excuse such an escape except the act of God, or of the enemies of the country, (d) or the authority of a court of competent jurisdiction; (e) but when it appears upon

(a) *Basset v. Salter*, 2 Mod. 136; *Ethevick v. Brewell*, Comb. 396.

(b) *Parsons v. Lee*, Jefferson's R. 50; *Smith v. Hart*, 1 Brevard, 146.

(c) 5 Mass. 310; 2 Chipm. 11.

(d) *Fairchild v. Case*, 24 Wend. 381; *Rainey v. Dunning*, 2 Murph. 386; *Baxter v. Taber*, 4 Mass. 361. See *Cargill v. Taylor*, 10 Mass. 206.

(e) *Bender v. Graham*, Minor, 269; *Stevenson v. Carothers*, 3 Yestes, 180.

the warrant of discharge, that the magistrates had no power to discharge the prisoner, such discharge will not excuse an escape; as, when a prisoner was liberated from prison by the certificate of two magistrates that he had taken the proper oath, and it appearing that they had administered the wrong oath, it was held that such discharge was an escape.(a)

*Art. 4.—Of a constructive escape.*

2341. A *constructive escape* takes place when the prisoner obtains more liberty than the law allows, although he still remains in confinement. The following cases are examples of such escapes: when a man marries his prisoner;(b) if an underkeeper be taken in execution, and delivered at the prison, and neither the sheriff nor any authorized person be there to receive him;(c) and where the keeper of the prison made one of the prisoners confined for debt a turnkey, and trusted him with the keys, it was held to be an escape.(d)

§ 2.—Of the officer's neglect to execute or return his writ.

2342. An officer is bound to make diligent search for the defendant, when he has a process against him, or for his property, when he is commanded by a lawful writ to seize it, and any neglect upon his part will make him liable to the plaintiff for any loss he may sustain on that account,(e) although he may have acted from a mistaken idea that he had no authority; as, where the sheriff suspends proceedings on the production of an insolvent's discharge to the defendant, he

(a) *Little v. Hasey*, 12 Mass. 319.

(b) *Bac. Ab. Escape*, B 3; *Plowd.* 17.

(c) *Colby v. Sampson*, 5 Mass. 310.

(d) *Wilkes v. Slaughter*, 3 Hawkes, 211; *Skinner v. White*, 9 N. H. Rep. 204; *Steere v. Field*, 2 Mason, 486.

(e) *Dunlap v. Berry*, 4 Soam. 327; *Ware v. Fowler*, 11 Shepl. 183; *Palmer v. Gallup*, 12 Conn. 555; *Tucker v. Bradley*, 15 Conn. 46.

incurs the peril of an action, if the discharge turns out to be void.(a)

For the same reason that he is liable when he does not execute the writ, the officer is responsible for an insufficient or defective execution; as, where he was required to make a levy upon real estate, and he did it so defectively that no title passed by it, he was held liable to an action for nominal damages, notwithstanding he showed that the debtor, at the time, had no valid title to the land.(b)

If the plaintiff sustain any damage in consequence of the sheriff's neglect to return his writ in due time, or within the period prescribed by the law of the place, an action will lie for such damage. In some states, the sheriff is required to make his return within a certain time after the return day, and on failure to do so, he is held responsible for the debt. He is also liable to the plaintiff for making a false return.

SECTION 2.—OF INJURIES ARISING FROM THE NEGLIGENCE OF CARRIERS.

2343. To entitle the party injured to an action for such an injury, the neglect must have been, 1, by a common carrier; 2, in not taking persons or property when he was bound so to do; 3, when he had convenient means and his fare had been tendered; 4, in not performing his obligations after having undertaken to do so.

§ 1.—Who is liable for neglect as a common carrier.

2344. We have seen, under a former title,(c) who is a common carrier. It is only required here to observe, that the superior alone is in general con-

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(a) *Orange County Bank v. Dubois*, 21 Wend. 351.

(b) *Bell v. Roberts*, 15 Verm. 741.

(c) *Ante*, n. 1020.

sidered as the servant of the public; but to this there is an exception, the master of a vessel being viewed in the light of a principal.(a) The ship owners are not, however, discharged from liability on this account, this claim upon the captain being merely a cumulative remedy.(b)

§ 2.—Of the persons and property they are bound to take.

2345. A common carrier fills a public station, and he is bound to discharge his duty, by administering equally and without discrimination to the necessities of each individual member of the community; so that his refusal or neglect is a breach of duty, and when this refusal is attended with inconvenience to the customer, he must compensate the loss, unless he has a lawful excuse for the refusal or neglect.(c)

2346. In general the time when the goods are to be delivered to him, is about the period he sets out on his accustomed journey. A land carrier may refuse to admit goods into his yard or warehouse before he is ready to take his journey, because that would increase his responsibility, unless, indeed, where there is an express undertaking, or there is a mode of dealing to receive packages at all times. Nor is a master of a vessel bound to receive goods, sent to be laden at unreasonable hours.(d) But, in either case, if the goods are accepted, the carrier's responsibility as to them attaches.

§ 3.—Of the carrier's ability and tender of the fare.

2347. To render the carrier liable for neglect, he must have the means of conveying the property; if his conveyance, be it a carriage, wagon, vessel, or

(a) *Morse v. Slus*, 190, 238; S. C. T. Raym. 220.

(b) *Boson v. Sandford*, 3 Lev. 258.

(c) *Bac. Ab. Carriers*, B; 1 Saund. 312, c; *Riley v. Horne*, 5 Bing. 217.

(d) *Lane v. Cotton*, 1 Ld. Raym. 652.



steamboat, is already full, he cannot be obliged to take more; but although he may have room, he is not bound to carry merchandise until the freight, or fare, has been tendered or paid to him.

§ 4.—Of injuries arising from neglect after having accepted the goods.

2348. Having accepted goods to carry, the carrier is responsible for the neglect of them, when an injury occurs to them, whether he has received payment of his hire or not. But if the goods were never given in charge to the carrier, as, if the owner puts them in the care of a servant, and sends him to have the sole charge of them, (a) the carrier is not responsible.

The carrier is bound to deliver goods to the persons to whom they are consigned, and when he delivers them to a person not entitled to them, he does so at his peril.

#### SECTION 3.—OF INJURIES ARISING FROM ACTS OF INNKEEPERS.

2349. In considering the obligations and rights of innkeepers, this subject was so fully examined, that we shall not be required here to do more than to refer to it. (b)

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#### TITLE III.—OF INJURIES TO REAL PROPERTY.

2350. Real property is corporeal and incorporeal, and the injuries to these will be separately examined.

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(a) *East India Co. v. Pullen*, Str. 690.

(b) *Ante*, n. 1016.

## CHAPTER I.—OF INJURIES TO REAL PROPERTY CORPOREAL.

2351. These injuries affect the possession, or right of possession, or a right in remainder or reversion.

## SECTION 1.—OF OUSTERS.

2352. *Ouster* is the actual turning out, or keeping excluded, the party entitled to possession of any real property corporeal. And such an ouster or dispossession may be either of the freehold or of chattels real; but it cannot be committed of any thing movable.(a) Ousters of the freehold may be effected by one of the following methods: abatement; intrusion; disseisin; discontinuance; deforcement; which will be considered under the first head: under the second will be examined the remedy for an ouster.

## § 1.—Of the kinds of ousters.

2353.—1. *Abatement*, in this sense, as an injury to real estate, is where a person dies seised of an inheritance, and before the heir or devisee enters, a stranger who has no right, makes entry, and gets possession of the freehold; this wrongful entry is called an abatement, and the person who makes it, an *abator*.(b) This is one of the highest injuries which can be committed against the right of real property.

2354.—2. *Intrusion* takes place, when, after the determination of a particular estate of freehold, a stranger enters wrongfully before the remainder man or reversioner; for example, when a tenant for life dies seised of certain lands, and after such death of the

(a) *Doe v. Cowley*, 1 Car. & P. 123; 3 Bl. Com. 167.

(b) By the ancient laws of Normandy, the term abatement was used to signify the act of one who, having the apparent right of possession of an estate, took possession immediately after the death of the actual possessor, before the heir entered. *Hollard, Anciennes Lois des Français*, tome i. p. 539.

tenant for life, a stranger enters before the remainder man or reversioner. (a) Intrusion differs from abatement only in this, that the former is an injury to the remainder man or reversioner, and the latter to the heir or devisee. The person who makes an intrusion, is an *intruder*.

2355.—3. *Disseisin* is a wrongful putting out of him who is seised of the freehold. (b) To make a disseisin, there must be a claim or color of title at the commencement; for any other entry is a mere trespass. To constitute a disseisin there must be an intention to obtain an adverse possession, and unless that be manifest, the wrongful act cannot put him out who is seised of the freehold.

2356. By *adverse possession* is meant the enjoyment of land; or such estate as lies in grant, under such circumstances as indicate that such enjoyment has been commenced and continued, under an assertion of right, on the part of the possessor. (c)

When a wrongful entry is made, by one claiming title, the rightful owner of the land may consider him as a disseisor of his whole interest, although such a wrong doer may claim a less estate; because a disseisor cannot qualify his own wrong, so as to prevent the owner from pursuing the remedies which the law has provided in cases of disseisin, and which are more specific and effectual than those of a mere trespass.

The person who makes a disseisin is called a *disseisor*.

2357.—4. The fourth kind of ouster is a *discontinuance*, which is an alienation made or suffered by the tenant in tail, or other tenant, seised in *auter droit*,

(a) Co. Litt. 277; F. N. B. 203; Archb. Civ. Pl. 12; Dane's Ab. Index, h. t.

(b) Co. Litt. 277; Taylor v. Horde, 1 Burr. 110; Litt. sec. 279.

(c) Campbell v. Wilson, 3 East, 294; Morris' Lessee v. Vanderen, 1 Dall. 67; Watson v. Gregg, 10 Watts, 289; Jones v. Porter, 3 Penna. 132; Jackson v. Huntingdon, 5 Pet. 402; Rung v. Shoneberger, 2 Watts, 23.

by which the issue in tail, or heir or successor, or those in reversion or remainder, are driven to their action and cannot enter; as, if tenant in tail makes a feoffment in fee simple, or for the life of the feoffee, or in tail; all which are beyond his power to make, for that, by the common law, extends no further than to make a lease for his own life; in such case the entry of the feoffee is lawful during the life of the feoffor; but if he retains possession after the life of the feoffor, it is an injury which is termed a discontinuance.(a)

2358.—5. The last species of injuries by ouster is called a *deforcement*. In its most extensive sense it signifies the wrongful holding of any lands or tenements to which another person has a right,(b) so that it includes as well an abatement, an intrusion, a disseisin, or a discontinuance, as any other species of wrong whatsoever, by which the owner of the freehold is kept out of possession. But as contradistinguished from the former, it is only a detainer of the freehold from him who has the right of property, as falls within none of the injuries above mentioned.(c) These distinctions are not generally regarded in this country; whenever a man is unlawfully kept out of the possession of lands to which he has a title, it is called a disseisin or an ouster.

§ 2.—Of the remedy for an ouster.

2359. It must be remembered that both the entry and the detention are unlawful in the cases of *abatement*, *intrusion*, and *disseisin*; in these cases the rightful owner of land has the right to make a reëntry, because, having been in possession, he regains that which has been wrongfully taken from him. But in a *discontinuance* and *deforcement*, not having been in

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(a) 3 Bl. Com. 172.

(b) Co. Litt. 277.

(c) 3 Bl. Com. 173; Archb. Civ. Pl. 13; Dane's Ab. Index, h. t.

possession, the lawful owner of the land cannot make such a reëtry; in these latter cases, he is driven to his legal remedy.

2360. When a reëtry is made, the owner of the land must, of course, be careful not to violate the law, for the law will never justify a man in doing an act by which he must violate its peaceable precepts. At the time of making such entry he should declare, in the presence of witnesses, that he thereby takes possession, and he will then be reinstated in his right and become reseiised. If he should be deterred from making an entry by menaces, or bodily fear, he may make a claim as near to the land as he can with like forms and solemnities. As this claim will be in force only for a year and a day, he must, before that time expires, repeat the claim, and so for all succeeding time once every year and day. This is called a *continual claim*; it has the same effect as a legal entry.

2361. This right may be barred, defeated, taken away, or *tollèd* by descent, as when one seiised by any means whatever of a corporeal hereditament dies, by which it descends to his heirs; then, however feeble the right of the ancestor might have been, the entry of any other person who claims right to the freehold is taken away, and he cannot recover possession of the heir by this summary method, but is driven to his action to recover the legal seisin of the estate. The heir of the disseisor has the right to the possession, and the disseisee the right to the estate. This is the general rule, unless the owner of the land is laboring under some disability, such as coverture, infancy, insanity, and the like.

Land, and the possession of it, may also be recovered by action. This mode of recovery will be considered when we come to treat of actions.

#### SECTION 2.—OF TRESPASS TO REAL ESTATE.

2362. The consideration of trespass to real estate

will lead us to inquire into, 1, the nature of the estate; 2, the title of the plaintiff; 3, the nature of the injury; 4, the justification of trespass on land.

§ 1.—The nature of the estate.

2363. By trespass to real estate is meant the several acts of breaking through an inclosure, and coming into contact with any corporeal hereditament, of which another is proprietor and in possession, without lawful authority, by which a damage has ensued.

Injuries by trespasses, are upon the land, or in the house of the party in actual possession, and without eviction, which distinguishes a mere trespass from an ouster. It must be an interest in the realty, something tangible; it may be an estate in fee, for life, or for years; or it may be an injury to the vesture, in short, any thing at once palpable and immovable, expressed by the term corporeal hereditament.

The law encircles every man's land with an ideal imaginary fence, and the act of a stranger unlawfully breaking through it is injurious. Where an actual, substantial boundary has been removed, the law instantly raises up an ideal one; and, it is for this reason, that if a man finding another's door open, unlawfully enter into the house, he is said to break into it.<sup>(a)</sup> To ascertain in any case whether the law surrounds a particular description of property with an inclosure, is to consider whether the owner may encircle his estate with a substantial visible fence.

§ 2.—Of the title of the plaintiff.

2364.—The *bare possession or occupancy* is a sufficient title to maintain trespass against all the world, except

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(a) 11 Hen. IV., Trin. 16, p. 75. See *Gilmore v. Wale*, Anthon, 64.

the proprietor himself.(a) Where the plaintiff has a quiet and peaceable possession, though he came to it tortiously, his title is sufficient against a stranger.(b)

On the contrary, a good title, without possession, is insufficient to maintain trespass, unless the owner was in possession at the time when the trespass was committed; for the gist of the action is the injury to the possession. A trespass cannot be committed against a reversioner, because he is not in possession, but against the tenant, who has no other title than the possession.

To maintain trespass, the owner must first possess himself of the soil by an entry on it. But having once entered, he has, in contemplation of law, been in possession from the moment his title first accrued: for example, an heir from the death of the ancestor; a devisee, from the decease of the devisor; a personal representative, from the death of the testator or intestate; and a purchaser from the conclusion of the contract.

When the possession has been once acquired, and it has been interrupted for a time, it must be regained before the owner of the land can punish a trespass committed after his right of repossession accrued. The following case exemplifies this rule: if A leases land for years, and after the determination of the term, B enters and subverts the soil, before A can demand reparation of this injury, A must have repossessed himself of the property.(c) But having done so, he is considered in possession by relation back, in the cases just mentioned, and immediately after his reentry he is accounted as having been in

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(a) *Townsend v. Kerns*, 2 Watts, 180.

(b) See *Cutts v. Spring*, 15 Mass. 135.

(c) *Bigelow v. Jones*, 10 Pick. 161; *Allen v. Thayer*, 17 Mass. 299; *Blood v. Wood*, 1 Met. 528.

possession from the time at which his tenant's interest expired.(a)

The entry which thus restores the right of the plaintiff, may be made upon a part of the land in the name of the whole,(b) and made either in person or by attorney. If a stranger enters of his own accord for the benefit of the owner, and, afterward, the owner recognizes the act, this makes the stranger attorney *ab initio*.

Where several persons are jointly interested in the possession as joint tenants or tenants in common, an entry by one inures to the benefit of all.(c)

§ 3.—Of the nature of the injury.

2365. It has already been stated that the act of breaking an inclosure is injurious to the proprietor, but it must be understood with this limitation, that it is so only where his occupation is thereby more or less incommoded. The ideal fence, of which mention has been made, extends upwards *a superfecie terræ usque ad calum*, and downward as far as his property descends, where a man is owner of the surface; and therefore breaking this ideal fence, either upward or downward, is in law a trespass; but such a trespass does not always entitle the owner to an action, because sometimes he receives no injury: for example, if a man flies a hawk across the land of another, or passes through the air in a balloon over a man's farm, he does no injury, and probably the owner of the land could not recover even nominal damages; but should such a person let something fall out of his balloon, or his bird should drop down dead on the land below, he could not lawfully enter to get what had so fallen, in

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(a) *Tyler v. Smith*, 8 Met. 590.

(b) *Cotton's case*, Cro. Eliz. 189.

(c) *Smales v. Dale*, Hob. 120.



order to remove it, and this shows the act is not justifiable.(a)

The act complained of must be upon or at least in contact with the land or building, or it cannot be deemed a trespass, but merely a nuisance, and must have been an act committed, or caused to have been committed by the defendant.

2366. It must be some act *done* so that it might be described as committed with *force*, for a mere *non-feasance* is not a trespass. Indeed it is questionable whether the mere continuance of an injury, for the inception of which the plaintiff has already recovered damages, can be treated as a trespass; as, for example, the neglect to remove an incumbrance on land, after a verdict for placing it thereon. But a tenant at will becomes a trespasser by an unreasonable delay in moving away from the premises after his estate is determined.(b)

2367. Every man is liable not only for his own acts, but also for those of his authorized agent in the particular transaction, when done at his request. He is also liable for the trespasses committed by his cattle, whose habit of wandering must be known, or presumed to be known to him, although without his concurrence; it would be otherwise as respects other animals, as a dog.(c) But the owner of such animal will not be liable for the trespass where the land was not fenced according to law, or where its owner was to blame in relation to such a trespass.

§ 4.—When a trespass may be justified or excused.

2368. A man may justify or excuse an entry into

(a) 2 Roll. Ab. 567, (L) pl. 1.

(b) *Ellis v. Paige*, 1 Pick. 47; *Rising v. Stannard*, 17 Mass. 282.

(c) 1 Car. & P. 1119; S. C. 11 Eng. C. L. R. 337. In Louisiana, under certain circumstances, the owner of a slave, or of an animal, may discharge himself from responsibility for the trespass, by abandoning the slave or animal. Civ. Code, Articles 180, 181, 2301.

the lands of another, either, 1, because he is authorized by law; or 2, because he has a license or authority from the owner, expressed or implied.

*Art. 1.—Of justification by authority in law.*

2369.—1. When the law commands one of its officers to do a thing, he is justified for so doing, while obeying the writ, precept, or warrant by which he is commanded so to do; and whether the warrant be founded on a valid judgment or not, is of no consequence to him, he is not to look beyond the words of the writ; but this must be understood with this qualification, that the court or magistrate who issued such a writ had jurisdiction of the case; for, unless they had, not only the officer but the court or magistrate will be trespassers.

An officer may enter the close of another, against whose person or property he is charged with the execution of a writ, and if obstacles are opposed to his progress he may throw them down. His authority in the execution of his writ is different as the process is of a civil or criminal nature. In the former case the officer is not justified in opening, even by unlatching the outer inlet to a house, as a door or window opening into the street,<sup>(a)</sup> although it has been closed for the very purpose of excluding him;<sup>(b)</sup> the reason assigned for this rule is, that otherwise the family within doors would be left naked and exposed to robbers from without.<sup>(c)</sup> But this privilege is qualified by the circumstance that the party whose arrest is desired has not escaped from the officer, for when he has so escaped, he is guilty of a wrong, which

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<sup>(a)</sup> Moore, 917, p. 668; Cooke's case, W. Jones, 429.

<sup>(b)</sup> Seyman v. Gresham, Cro. Eliz. 908.

<sup>(c)</sup> Lee v. Gansel, Cowp. 1. See, as to the extent of the privilege, Penton v. Brown, 1 Keb. 698.

authorizes the breaking of an outer door to retake him.(a)

This privilege protecting the outer inlet from being broken in a civil case, is limited to the owner alone, and will not screen the person of another, who, with the owner's assent, flies to the house for protection from a civil process, nor such a stranger's goods which have so been removed into the house; but the case is otherwise when the stranger or his property are there *bona fide*, and without fraud or covin.(b)

But in the latter case, or when the process is of a criminal nature, the officer is justified in breaking an outer door, the owner having no such privilege or immunity from invasion, because the general interest of the commonwealth requires that criminals should be arrested, and the law put in force, and in this, and all other cases, the convenience of a private individual must yield to the requirements for the public good.(c) A constable may, therefore, break open the outer door of a dwelling house, to arrest one within, suspected of felony; and a sheriff may do the same thing to execute a process of a criminal nature, as for a contempt.

It must, however, be remembered that the law never sanctions acts of violence, when its commands can be enforced by the adoption of lenient measures, so that if an officer finds an outer door fastened, when he is authorized to enter, he should in the first place demand that it should be opened, and, on the refusal or neglect of those within to do so in a reasonable time, he is justified in breaking it open; but if it be broken without a demand, the trespass cannot be justified, unless there is danger that by the delay an affray, murder, or other crime may be committed. An officer cannot

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(a) 7 Mod. 8; Palm. 54; Genner v. Sparks, 1 Salk. 9.

(b) Semayne's case, 5 Co. 93.

(c) Burdett v. Abbott, 14 East, 1.

justify breaking an outer door in the night time for any other cause than treason or felony, or to prevent an affray, riot, or other crime.(a)

When an outer door or window is open, the officer may enter through it to execute a civil writ, and, having once lawfully entered, he may in every case, when necessary, break open an inner door, or force open a lodger's apartment opening to the stairs or passage.(b)

2370.—2. The landlord, to whom rent is lawfully due, may enter the premises to distrain, the outer door being open, but he has no right to force it; he is bound to act in every way with the same forbearance as an officer who is authorized to execute mere civil process.

2371.—3. The owner of goods and chattels may enter the land of another upon which they are placed, and remove them, provided they are there without his default; as, where a man's tree is blown down by a storm, and fallen on the adjoining estate, or his fruit has fallen into it, from a branch which overhung it;(c) but if the owner of the chattel be the least in fault, he cannot lawfully enter, as in the instance of a man letting a chattel fall from his balloon, while traversing the air over the land, as has already been mentioned.

The owner of cattle may enter the land of a stranger to retake them, when such cattle have gone there, through the latter's default, in not keeping up his fence as the law requires; but if he allows them to remain there after he has had notice, he cannot then enter; for then, they are there through his default, and may be distrained damage feasant.

2372.—4. One joint tenant, or tenant in common

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(a) *Smith v. Smith*, Oro. *Eliz.* 741; *Foster v. Hill*, 1 *Bulst.* 146.

(b) *Lee v. Gansel*, *Cowp.* 1.

(c) 20 *Vin. Ab.* 418.

of a personal chattel, as a horse, cannot enter the close of the other to take it away, because the latter has an equal right to the possession with himself.(a)

2373.—5. When a duty is imposed by law on a man to perform an act, and it cannot be done without entering the land of another, the person thus required will be justified in making an entry; as, for example, where a company are required to make a road, or keep it in repair, they will be justified in a necessary entry on a stranger's land for that purpose, but in that case they will be required to pay him for the damage they may commit, and strictly pursue the authority given to them by the legislature;(b) or if one man is bound to repair or cleanse a dyke on the land of another, he may enter for that purpose, even though the dyke be an easement to his own land; and he may in either case do all the acts requisite to accomplish his purpose.(c)

2374.—6. A creditor has a right to enter the land of his debtor to demand a debt, or duty actually due, even though such debt is not payable there, nor the duty to be performed at that place; but till it is due, the creditor has no such right.

2375.—7. Every traveller has a right to enter a common inn, at all reasonable times, provided the host has sufficient room and accommodation, which if he has not, it is for him to declare; the law requiring him to accommodate all travellers, without distinction, unless the applicant has by his conduct rendered himself unfit to be taken into the house, as, where he is drunk, or is afflicted with a contagious disease.

2376.—8. Every man may abate a public nuisance, and a private one may be thrown down by the party grieved, and this even before any prejudice has hap-

(a) Godb. pl. 403, p. 282. See *Hyde v. Stone*, 7 Wend. 354; S. C. 9 Cowen, 230; *Erwin v. Olmstead*, 7 Cowen, 229.

(b) *Bonaparte v. Camden and Amboy Rail Road Company*, Baldw. 231.

(c) *Nicholas v. Chamberlain*, Cro. Jac. 121.

pened, but only from the probability that it may happen; for this purpose the abator has authority to enter the land on which it stands: example, where A has a right to a stream of water flowing through B's land, and its course is interrupted in the land of B, A may enter and remove the obstruction; but until the nuisance has been so far completed as to create an inconvenience, it cannot be removed.

Upon the like principle, a man may destroy the property of another, where the public good or his own requires it; as where a house is on fire, which may endanger a whole town, any one has a right to pull it down, to stop the progress of the flames, and prevent further mischief; so a man may pull down the dwelling of his neighbor on fire, to prevent the destruction of his own; in these and similar cases, he has a right of entry for that purpose, for the maxim *salus populi est suprema lex*, applies in such cases. (a)

*Art. 2.—Of justification by an authority in fact.*

2377. Having enumerated the various kinds of authority in law which will justify a trespass, it will be requisite now to consider what authority in fact will have the same effect.

2378.—1. A man has the privilege of entering upon the land of another to exercise therein an incorporeal right, or hereditament, to which he is entitled. Incorporeal hereditaments are distributed under two classes, namely, profits and easements. *Profits*, which comprehend the produce of the soil, whether it arise above or below the surface; as herbage, wood, turf, coals, minerals, stones, also fish in a pond or running water. Profits are divided into *profits à prendre*, or those taken and enjoyed by the mere act of the

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(a) 11 Co. 13; Jacob's Inter. Max. 115; Beach v. Trudgain, 2 Gratt. 219. See Rector, etc. v. Buckhart, 3 Hill, 193; Bac. Max. reg. 12; Noy's Max. 36, 9th ed.; Broome's Max. 1; Dyer, 36, b.

proprietor himself; and *profits à rendre*, or such as are realized at the hands of, or rendered by another. The second class of incorporeal hereditaments are called *easements*. This subject having been fully considered in another place, it is not required to give it any further examination here.(a)

2379.—2. The second kind of right arising from an authority in fact, is that of a license. A *license*, is a right given by some competent authority to do an act which, without such authority would be illegal. A license is express or implied, when considered as to the manner of granting it; as to its effects, it is a bare authority, without interest, or it is coupled with an interest.

First. A license is *express* where in direct terms it authorizes the performance of a certain act; as where a man who owns a dam authorizes his neighbor to draw water from it to his mill; in this case the licensee has a right to enter the premises to get the water.

Secondly. An *implied* license is one which, though not expressly given, may be presumed from the acts of the party who has a right to give it. The following are examples of such licenses:

1st. When a man knocks at another's door, and it is opened, the act of opening the door licenses the former to enter the house for any lawful purpose; but if the opening of the door has been obtained for an unlawful purpose, and then violence is used to obtain an entry, the party will be a trespasser.(b)

2d. A servant, in consequence of his employ, is licensed to admit into the house those who come on his master's business, but only such persons; and therefore, where the plaintiff's daughter and servant let the defendant into her master's house for the unlawful

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(a) Ante, n. 1644.

(b) *Parke v. Evans*, Hob. 62.

purpose of sleeping with her, his entry was illegal.(a) Nor has a wife a greater privilege, in this respect, than a servant:(b) though it may be inferred from circumstances, that the master has given to the servant, and the husband to his wife, a general authority to invite whom they please to the house.

3d. A man who keeps a store for the sale of merchandise, is presumed to license all persons to enter who come there for lawful purposes; and the same presumptions will arise in all cases where a person expects, or invites customers to come and deal with him, let his business be what it may.

Thirdly. A *bare* license or authority is such as is given without consideration; as long as it remains executory, that is, until it has been carried partially or wholly into effect, it is not binding on the party conferring it, so that he may revoke it at his pleasure; but when carried into effect, either partially or altogether, it can only be rescinded, if in its nature it is capable of revocation, by placing the licensee in the same situation in which he stood before he entered on its execution.(c) A bare license may be verbal, but if it be coupled with an interest, the formalities essential to confer such an interest should be observed.

Such a bare license must be executed by the party to whom it is given in person, and does not in general extend to others, unless, from the circumstances, it can be presumed that there was an implied license to such persons; as where a license is given to a man to remove a weighty matter, which requires the assistance of several other persons.

Fourthly. A license, *coupled with an interest*, is where the party obtaining a license to do a thing, also acquires a right to do it; in such case the authority

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(a) Cook v. Wortham, Selw. N. P. 999.

(b) Taylor v. Fisher, Cro. Eliz. 246.

(c) Winter v. Brockwell, 8 East, 308.



conferred is not merely a permission, it amounts to a grant, and it may be assigned to a third person, which a bare license cannot be. (a)

2380. When a license is given, it is presumed the donor gives all the privileges absolutely necessary to the complete enjoyment of such an incorporeal right; and, therefore, where there was a grant of a free and convenient way over land, for the purpose of conveying coals, the grantor was held entitled to lay a frame wagon-way upon the land, such a way being necessary to accomplish the purpose of the grant. (b) It is a rule, too, that one in the exercise of a right, has authority by law to do all acts incidentally essential to its enjoyment, it follows that if obstacles are opposed to the enjoyment of an incorporeal hereditament or a license, the licensee may remove them, occasioning the opposite party no greater detriment than is necessary, or the circumstances of the case may render indispensable.

2381. When an entry has been lawfully made, and afterward the party who has made it abuses his authority, he becomes responsible for the consequences, but in a different degree, as the authority was one in law or one in fact.

1st. When a man has lawfully entered by virtue of an authority *in law*, and then abuses his right, he becomes a trespasser *ab initio*, for he is then considered as having intended from the beginning to commit a trespass, and he is not looked upon as a servant of the law; as if a constable or a sheriff, having an execution authorizing him to seize the defendant's goods, take his person; or if a landlord distrains for rent, and afterward the tenant offers all the rent in arrear and costs, but, notwithstanding, the landlord persists

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(a) *Warren v. Arthur*, 2 Mod. 317; *Bringle v. Morrice*, 1 Mod. 210; *Crabb on R. P.* §§ 521 to 525.

(b) *Stenhouse v. Christian*, 1 T. R. 560.

in his distress, he will be considered as a trespasser *ab initio*.

As a general rule, whenever an officer makes an entry, and violates his duties toward a defendant, as by taking property to which he is not entitled, or before he is entitled, or in a manner not warranted by law, or does not release it, after being paid the debt and costs for which he had seized it, he becomes a trespasser *ab initio*.(a)

It may be observed that a mere non-feasance is not such an abuse of authority as to make a man a trespasser *ab initio*, there must be a direct wrong; where several defendants entered an inn, and, having eaten and drank, refused to pay, it was adjudged that such refusal did not make them trespassers from the beginning, or the entry into the house an act of trespass.(b)

2d. When the authority is derived not from the law, but the entry is made under an authority *in fact*, the consequences are not the same, as when it is made in consequence of an authority in law. The party giving the authority by his act sanctions all other acts incidentally necessary to attain the end for which it was given; if the privilege has been abused, the defendant becomes a trespasser not *ab initio*, but for the excess only, supposing his abuse of the power to be, in itself, a forcible injury.(c)

### SECTION 3.—OF INJURIES DONE TO REAL ESTATE BY NUISANCES.

2382. Literally the word *nuisance* means annoyance. It is any thing which unlawfully works hurt,

(a) Bond v. Wilder, 16 Verm. 393; Smith v. Gates, 21 Pick. 55; Van Brunt v. Schenck, Anthon, 157; Ballard v. Noaks, 2 Pike, 45.

(b) Six Carpenters' case, 8 Co. 290.

(c) Bac. Ab. Trespass, B; Bradley v. Davis, 2 Shepl. 44; Jarrett v. Gwathmey, 5 Blackf. 237; Wendell v. Johnson, 8 N. H. Rep. 220; Cushing v. Adams, 18 Pick. 110.

inconvenience or damage to others.(a) Nuisances are of two kinds, namely, public and private. A public nuisance, which affects all the citizens of the commonwealth, is classed among public wrongs; a private nuisance is one which is injurious to the lands, tenements or hereditaments of another.

For the injuries sustained from a public nuisance, a private individual has no remedy, unless he has received special damages,(b) the proper redress for this species of wrong being by indictment.(c) But when the nuisance is of a private nature, any one injured by it has various remedies adapted to the circumstances of the case.

Nuisances of a private nature are to corporeal or incorporeal property.

§ 1.—Nuisances to corporeal inheritances.

2383. These nuisances affect the habitation of man, houses, mills, or lands.

1. Nuisances frequently affect the *habitation* so as to render it uncomfortable and unwholesome, as where one neighbor sets up and exercises an offensive trade by which the air is corrupted, or if he keeps hogs or other noisome animals, so as to render his neighbor's dwelling unwholesome; these are nuisances, for although a man may follow such a trade, and keep such animals, yet he must do so by having a proper place, where he will not injure his neighbors; for the rule *sic utere tuo ut alienum non ledas*, applies in such cases, and these nuisances are therefore actionable.(d)

(a) 3 Bl. Com. 215.

(b) *Lansing v. Smith*, 4 Wend. 9; *Burrows v. Pixley*, 1 Root, 362; *Harrison v. Sterret*, 4 Harr. & McH. 540; *Shaw v. Cummeaky*, 7 Pick. 76; *Howell v. McCoy*, 3 Rawle, 256; *Mills v. Hall*, 9 Wend. 315; *Pittsburgh v. Scott*, 1 Penn. St. R. 309.

(c) The party injured by a public nuisance may, in some cases, obtain an injunction in equity.

(d) *Cro. Car.* 510; *Bac. Ab. Nuisances, A.* See *State v. Purse*, 4 McCord, 472.

2. A nuisance to a *house*, whether it be a dwelling or not, may be,

First, by overhanging it, which is also a kind of trespass, for, as we have seen, the owner of the surface of the earth has a right upward *usque ad calum*, and his property is surrounded by an ideal fence, which is broken by so building as to overhang it.

Secondly, by stopping ancient lights, to which the owner is entitled.

Thirdly, by corrupting the air with noisome smells.

3. Nuisances to *mills*, and the streams connected with them, commonly arise from the unlawful use of the water, by which the superior mill is overflowed with back water. This subject was fully examined when we were considering the rights of riparian owners.(a)

4. Nuisances to *land* may arise in various ways; if, for example, one erects a smelting house for lead, so near the land of another, that the vapor and smoke kill his corn and grass, or injure his cattle feeding on his land, this is a nuisance. And thus any lawful act, done in an improper place, by which an injury arises to a third person, becomes a nuisance; because a man must do a lawful act in a proper place, and not where it will be injurious to others.(b)

It is also a nuisance injurious to land so to dam water as to make it overflow that of a neighbor; or to stop or divert water which naturally runs to another's meadow or mill; to corrupt or poison a water course by using a dye house, or a lime pit, or a tannery,(c) either for the use of trade or otherwise, in the upper part of the stream; or to erect a dam in a public stream, by which the plaintiff sustains a loss.(d)

(a) Ante, n. 1614.

(b) Bac. Ab. Actions on the Case, F; 1 Roll. Ab. 89; Rex v. White, 1 Burr. 333.

(c) Howell v. McCoy, 3 Rawle, 256.

(d) Hughes v. Heiser, 1 Binn. 463; Alexander v. Kerr, 2 Rawle, 83.

Indeed, upon the principle already cited, that every one is bound to use his own so as not to injure his neighbor, or of doing unto others as he would they should do unto him, no one is allowed to do that on his own estate, which must be injurious to his neighbors, without being answerable in damages for the consequences.

§ 2.—Of nuisances to incorporeal hereditaments.

2384. The law looks upon a nuisance to *incorporeal* hereditaments in the same light as upon a nuisance to corporeal hereditaments. Where a man has a right of way, annexed to his estate, to pass over another man's land, and it is obstructed or stopped, so as to deprive the owner of the land to pass over the same, this is a nuisance.

§ 3.—Of the remedy for a nuisance.

2385. There are several remedies for the prevention of a nuisance, and for compensation. These are, 1, by injunction; 2, by abatement; and, 3, by action.

*Art. 1.—Remedy for the prevention of nuisances by injunction.*

2386. In England there is a species of injury, which is frequently a nuisance, called *purpresture*. It takes place when an individual encroaches, or makes that several to himself, which ought to be common to many; (a) as if an individual were to build between high and low water mark on the side of a public river. In cases of this kind an injunction will be granted, on *ex parte* affidavits, to restrain such a *purpresture* and nuisance. (b)

Bills to restrain public nuisances can extend only to such as are nuisances at law. (c) And it must be

(a) Skene, h. v.; Glanville, l. 9, c. 11, p. 329, note by Beame; 2 Inst. 38, 272; Spelm. Glos. h. v.; Hale de Portibus Maris, Harg. Tr. 84.

(b) Attorney Gen. v. Johnson, 1 Wels. Ch. R. 87.

(c) Barnes v. Baker, Amb. 168.

remembered that nuisances which are of a criminal nature, and indictable, are not cognizable in a court of equity.

An injunction may be had to prevent a private nuisance, but every common trespass will not be considered a nuisance. Until the party fully establishes his title, the injunction will not be granted, nor in general until there has been a trial at law to establish the existence of the nuisance, when the matter complained of is not *ipso facto* a nuisance, but may be so according to circumstances, which must be found by the verdict of a jury.<sup>(a)</sup>

In general, courts of equity will not enjoin, when their interference would stop a large trading concern, in which a capital of great amount had been embarked, because such stoppage might be very injurious, until answer.

But in a *plain case* of nuisance, the court will interfere upon affidavits, certificate and notice, and will not suffer the nuisance to go on to the prejudice of the party in the mean time, but grant an injunction until a trial shall be had.<sup>(b)</sup>

*Art. 2.—Of the remedy by abatement.*

2387. By abatement of a nuisance, is understood its prostration or removal. Let us inquire, 1, who may abate a nuisance; 2, the manner of abating it.

1. *Who may abate a nuisance.*

2388.—1. Any person may abate a public nuisance, because its creation and maintenance is a misdemeanor, and it is for the interest of the public it should not exist.

2389.—2. The injured party may abate a private nuisance, which is created by an act of *commission*,

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<sup>(a)</sup> Saund. 174.

<sup>(b)</sup> Attorney General v. Doughty, 2 Ves. 453.

without notice to the person who committed it; but there are few cases which sanction the abatement by an individual of a nuisance from *omission*, without notice, except that of cutting branches of trees, which overhang a public road, or the private property of the person who cuts them.

2. *Of the manner of removing a nuisance.*

2390.—1. A public nuisance may be abated without notice, and in the abatement of it the abator need not observe particular care in abating it, so as to prevent injury to the materials. And though a gate illegally fastened on a public highway might have been opened, without cutting it down, yet the cutting it down would not be unlawful. However, as a general rule, the abatement must be limited by its necessity, and no wanton or unnecessary injury must be committed.

2391.—2. As to private nuisances, it has been held that if a man, in his own soil, erects a thing which is a nuisance to another, as by stopping a rivulet, and so diminishing the water used by the latter for his cattle, the party injured may enter the soil of the other, and abate the nuisance and justify the trespass; and this right of abatement is not confined merely to a house, mill, or land.

The abator of a private nuisance cannot remove the materials further than necessary, nor convert them to his own use. Care must be taken that only the thing which causes the nuisance be removed, and the removal of any excess will make the abator a wrong doer; as if a wall be built too high, and by that means becomes a nuisance, only the excess can be removed. (a)

When the security of lives or property may require so speedy a remedy, as not to allow time to call on the person on whose property the mischief has arisen, to

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(a) Baten's case, 9 Co. 54; Godb. 221; Str. 686.

remedy it, an individual would be justified in abating a nuisance from omission without notice.(a)

*Art. 3.—Of the remedy by action.*

2392. By the ancient English law, there were two remedies intended to secure the removal of a nuisance, but they have both gone a good deal out of use, though they are not absolutely obsolete. These two actions could only be brought by the tenant of the freehold, and by a lessee for years, whose only remedy is an action upon the case.

2393.—1. An assize of nuisance is a writ, in which it is stated that the injured party complains of some particular act done, *ad nocumentum liberi tenementi sui*; it commands the sheriff to summon an assize, that is a jury, and view the premises, and have them at the next commission of assizes, that justice may be done therein, and if the assize is found for the plaintiff, he shall have judgment of two things: 1, that the nuisance be abated; and 2, to recover damages.(b)

2394.—2. Before the statute of Westm. 2, 13 Edw. I. c. 24, no action could be brought against the alienee of the tenements whereon the nuisance was situated. Before the passage of this statute, the party injured, upon the alienation of the land on which the nuisance was set up, was driven to his *quod permittat prosternare*, which is in the nature of a writ of right. This writ, commanding the defendant to permit the plaintiff to abate the nuisance complained of, and unless he so permit, to summon to appear, and show cause why he will not. These two actions have become almost obsolete.

2395.—3. The usual remedy for a private nuisance is by action on the case for damages. In this action the party injured recovers damages only for the injury

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(a) 2 B. & Cr. 311; 3 Dowl. & R. 556.

(b) 9 Co. 55; 3 Bl. Com. 221.



he has sustained, but he cannot in this action, compel the removal of the nuisance.

This action is brought for injuries committed off the land, against the wrong doer. When the nuisance is continued, successive actions may be brought, even by a reversioner, until the wrong doer has been induced to remove the nuisance complained of. It must be remembered that a mere continuer of a nuisance, who has not himself set it up, ought to be requested to remove it, before an action is brought against him.<sup>(a)</sup>

When a nuisance continues in its consequence, so as to be injurious to the reversioner or remainder man, he may maintain an action for the damage caused to his interest.

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#### CHAPTER II.—OF INJURIES TO THE REVERSION AND REMAINDER BY WASTE.

2396. The principal injury affecting remainders and reversions, is that committed upon or to the buildings or land, during a tenancy for life or years, by waste.

2397. *Waste* is the spoil or destruction in houses, gardens, trees or other corporeal hereditaments, to the disherison of him who has the reversion or remainder in fee simple or fee tail. Waste is of several kinds; it may be committed by persons standing in a particular situation to the owner of the land; and for this, the law gives a remedy.

#### SECTION 1.—OF THE SEVERAL KINDS OF WASTE.

2398. Waste is either active or wilful, usually termed *voluntary* waste; or it arises from mere negligence, which is called *permissive* waste.

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(a) *Winsmore v. Greenbank*, Willes, 583; Cro. Jac. 555.

## § 1.—Of voluntary waste.

2399. This kind of waste is committed by injuries to, 1, houses; 2, cultivated lands; 3, wild lands; 4, mines, quarries, and the like.

*Art. 1.—Of waste to houses.*

2400. It is committed in *houses* by removing wainscots, floors, benches, furnaces, window-glass, windows, doors, shelves, and other things once fixed to the freehold, whether the same have been built by the owner of the land himself, or by his tenant. This must however be understood with this qualification, that when fixtures have been erected by the tenant for the purposes of trade, he is at liberty to take them away.(a)

As to the manner of committing it, it may be observed, that it is waste not only to pull down houses or parts of them, but also to change their forms, as, if a tenant pull down a house and erect a new one in its place, whether it be larger or smaller than the first;(b) but this seems not well settled, and it is probable that if the lessee were to build a new and valuable house, which would benefit the estate, or take down an old house of not much value and build a larger and better in its place, it would not be considered waste.(c) It is waste to convert a parlor into a stable, or a grist-mill into a fulling-mill, or to turn two rooms into one.(d) The building of a house where there was none before is said to be waste,(e) though this is doubted; and, the pulling it down after it is built, is waste.(f)

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(a) Ante, n. 1584.

(b) 2 Roll. Ab. 815, l. 38; Bac. Ab. Waste, C.

(c) Eden on Inj. 187.

(d) 2 Roll. Ab. 815, l. 37.

(e) Co. Litt. 53, a. But see *Pyncheon v. Stearns*, 11 Met. 304; *Charles v. Charles*, 3 Standf. ch. R. 601; *Windship v. Pitt*, 3 Paige, 259.

(f) Com. Dig. Waste, D 2.

*Art. 2.—Of waste to improved lands.*

2401. Waste is frequently and easily committed on *cultivated fields, orchards, gardens, meadows*, and the like. It is waste to convert arable to woodland, and the contrary; or meadow to arable; or meadow to orchard;(a) and the impoverishment of fields, by constant tillage from year to year, was held to be waste, and so was the removal of bog grass from a farm where it had usually been foddered upon.(b) Cutting down fruit trees, although planted by the tenant himself, is waste;(c) and it was held to be waste, for an outgoing tenant of garden ground, to plough up strawberry beds which he had bought of a former tenant when he entered.(d) This was pure mischief, which did the tenant no good; and, although the owner of the land could not be made to pay for such improvements of his estate, as in some cases it might cramp him very much, yet in *foro conscientie* he ought not to ask that which was a loss to the tenant and a gain to himself, for nothing.

When by the terms of his lease the tenant is entitled to cut down trees, he is restrained nevertheless from cutting down ornamental trees, or those planted for shelter,(e) or to exclude objects from sight,(f) or fruit trees, or even timber trees, or those used in building, if a sufficiency of other trees can be had; but of course this must be so understood that when timber is required for repairs of the buildings, fences, hedges, gates, and the like, on the leased premises, the tenant may cut down timber trees for that purpose.(g)

(a) Co. Litt. 53, b.

(b) *Sarles v. Sarles*, 3 Standf. Ch. R. 601.

(c) 2 Roll. Ab. 817, l. 30.

(d) *Wetherell v. Howells*, 1 Campb. 227.(e) *P—— v. Bell*, 6 Ves. 419.(f) *Day v. Merry*, 16 Ves. 375.

(g) Co. Litt. 53, b.

*Art. 3.—Of waste to wild lands.*

2402. The doctrine of waste is somewhat different in this country, as it relates to cutting down timber trees, particularly, from what it is in England, it being adapted to our circumstances. In the United States there is an excess of woodland, in England a scarcity; what would be waste there, might in some places be a benefit here. In most of the states the law has applied itself to our situation, and many of those acts which in England would be accounted waste, are not so considered here.(a) When wild and uncultivated land, wholly covered with wood and timber, is leased, the lessee may fell a part of the wood and timber, so as to fit the land for cultivation, without being liable to waste, but he cannot cut down the whole so as permanently to injure the inheritance. And to what extent the wood and timber on such land may be cut down without waste, is a question for the jury under the direction of the court.(b)

The tenant may of course, in the absence of all restrictions in the lease, cut down trees for the reparation of the houses, fences, hedges, stiles, gates, and the like, and for making and repairing all instruments of husbandry requisite for the cultivation of the land, as ploughs, carts, harrows, rakes, forks, etc.(c) But he must use in the first place such dead timber as may answer the purpose.(d)

*Art. 4.—Of waste in opening mines, quarries, and the like.*

2403. It is a general rule that when land is leased with the mines, and there are open mines of metal or

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(a) *Hastings v. Crunkleton*, 3 Yeates, 261.

(b) *Jackson ex dem. Church v. Brownson*, 7 John. 227.

(c) *Co. Litt.* 53, b; *Wood's Inst.* 344.

(d) *Com. Dig. Waste*, D 5; *F. N. B.* 59, M.

coal, or pits of gravel, lime, clay, brick, earth, stone, and the like, the tenant may dig out of such mines or pits, (a) unless restrained by his lease. (b) But he cannot open any new mines or pits without being guilty of waste. (c) In either case, however, the right may be qualified by the agreement of the parties; a tenant may be authorized to open new mines, without committing waste, or he may be restricted in the use of such as are already open.

It is said, that the tenant may take as much coal, iron and stone, as is necessary for his own use, without selling; (d) and he may dig for gravel or clay for the reparation of the houses, though the quarries are not open. (e)

§ 2.—Of permissive waste.

2404. *Permissive waste* in houses is punishable where the tenant is expressly bound to repair, or when he is so obliged on an implied covenant. (f) In the absence of all agreements between the parties, the tenant is always required to do the necessary repairs to prevent the destruction of the property; he is therefore bound to put in all windows or doors that have been broken by him, so as to prevent any decay of the premises, but he is not obliged to put a new roof on an old worn-out house. (g) The neglect to make such repairs, or those for which he has expressly covenanted, is *permissive waste*. (h)

SECTION 2.—BY WHOM WASTE MAY BE COMMITTED.

2405. With regard to the persons who may commit

(a) Com. Dig. Waste, D 4; 2 Roll. Ab. 816.

(b) 1 Cruise, 132; 1 Chit. Pr. 184; 5 Co. Rep. 12.

(c) Co. Litt. 53, b; Sandor's case, 5 Co. 12.

(d) 2 Roll. Ab. 816. See Lord Courtownard, 1 Sch. & Lef. 8.

(e) Co. Litt. 53, b.

(f) 1 Bac. Ab. Waste, F.

(g) Ferguson v. ———, 2 Esp. N. P. C. 590.

(h) Com. Dig. Waste, D 2.

waste, and how far each class shall be held responsible, it may be said there is some confusion. These classes shall be separately examined.

§ 1.—Of waste by tenant for life.

2406. Tenants for life, unless holding without impeachment of waste, and of course dispunishable for waste, are liable for any actual and wilful waste, as by cutting trees otherwise than for repairs, or for house-bote, hay-bote, plough-bote, or fire-bote.(a)

But although a tenant for life may hold without impeachment of waste, yet he is not at liberty wantonly to destroy the estate; he will not be allowed to cut timber serving for shelter or ornament, or fruit trees, if any other of a proper growth be fit to be cut. A tenant for years, without impeachment of waste, is in the situation of a tenant for life, with such a clause in his lease, and they will both be restrained and enjoined in equity from committing malicious waste.(b) Equity will not allow a tenant for years, with such a clause, to fell timber just before the expiration of his lease,(c) nor to dig and carry away the soil to make bricks.(d)

Two English statutes made provision for the punishment of waste committed by any tenant for life or for years; the statute of Marlbridge, 52 Hen. III., c. 24, authorized the action of waste, and gave full damages; and the statute of Gloucester, 6 Edw. I., c. 5, extended the penalty to a forfeiture of the place wasted, and treble damages. The principles of these statutes have been reenacted or incorporated, with modifications, into the laws of many states of the Union.

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(a) Co. Litt. 53, b; Bro. Waste, 130; Hob. 296.

(b) Dane's Ab. c. 78, a. 14, § 7; Bac. Ab. Waste, N; Rolt v. Somerville, 2 Eq. Cas. Ab. tit. Waste, A, pl. 8.

(c) Abraham v. Bubb, 1 Cruise, 258.

(d) Bishop of London v. Webb, 1 P. Wms. 527.

## § 2.—Of waste by tenant for years.

2407. Tenants for a term of years are liable for wilful waste, whether committed by themselves or a stranger. When such tenants hold under a lease or express demise, they are not liable for *permissive* waste in buildings, unless they have covenanted to repair.(a)

In the absence of all express covenants, there is always an implied covenant on the part of the lessee to use a farm in a husband-like manner, and not to exhaust the soil by neglectful or improper tillage.(b)

## § 3.—Of waste by tenant from year to year.

2408. Like a tenant for a term of years, a tenant from year to year is bound not to commit waste, such as ploughing up strawberry beds still in bearing, and this, although he paid for them at a valuation, having bought them from a former tenant, when he entered.(c)

As to *permissive* waste, such a tenant does not appear to be liable for it, for he is not bound to make or do what are called tenant's repairs, that is, to keep the premises wind and water tight, unless there is an agreement or covenant so to do.(d) But a tenant from year to year, or for a less period than a year, like any other tenant, is bound by his implied agreement to use the premises in a *tenant-like* manner, or in case of lands, in a *husband-like* manner, and any violation of this implied covenant will be considered as waste.(e)

(a) *Herne v. Benbow*, 4 Taunt. 764. See 1 Tho. Co. Litt. 644; 5 Co. 13, b; 2 Saund. 522 a, note 1.

(b) *Powley v. Walker*, 5 T. R. 373.

(c) *Whetherell v. Howells*, 1 Campb. 227.

(d) 4 Taunt. 764; *Jones v. Hill*, J. B. Moore, 100; 1 Chit. Pr. 390.

(e) *Powley v. Walker*, 5 T. R. 373; *Lekh v. Hewitt*, 4 East, 154; but see 2 Bar. & Cr. 273.

## § 4.—Of waste committed by strangers.

2409. Tenants for life, and tenants by the curtesy and in dower, or for years, are answerable for waste committed by a stranger, to the remainder man or reversioner. As a general rule, unless there is a special agreement to the contrary, the tenant is responsible to the reversioner for all injuries amounting to waste, done to the premises during the term, by whomsoever they may have been committed, with the exception of the acts of God, or inevitable accidents, those of a public enemy, or of the reversioner himself. The reason appears to be, that the landlord not being on the spot to protect the property against strangers, the law has cast that duty on the tenant, who is presumed to be able to do so.(a)

But although the tenant is liable for waste committed by a trespasser, yet, when the injury is done to the reversionary estate, the reversioner may maintain an action on the case in the nature of waste against the strange trespasser;(b) as where timber is cut down by a stranger, while the property is in the possession of a tenant for years, trespass *vi et armis* will lie against a third person for carrying it away after it has been cut down.(c)

## SECTION 3.—OF REMEDY FOR WASTE.

2410. There are three remedies for waste: 1, by injunction; 2, by estrepement; 3, by action. The first two are preventive, the last is compensatory.

## § 1.—Of injunction to prevent waste.

2411. A bill in equity to stay waste, either

(a) See *White v. Wagner*, 4 Har. & John. 373; *Fay v. Brewer*, 3 Pick. 203; *Elliott v. Smith*, 2 N. Hamp. 430; *Randall v. Cleaveland*, 6 Conn. 328.

(b) 6 Conn. 328; 2 N. Hamp. 430. But a technical action of waste will not lie in such case. *Wilford v. Rose*, 2 Root, 20.

(c) 2 Chit. Rep. 636.



threatened, or which the wrong doer is in the act of committing, is one of the most efficacious remedies. When the case is fully made out, an injunction will be granted, and this will completely prevent the commission of *future* waste. It is granted to restrain permissive as well as voluntary waste,<sup>(a)</sup> and whether an action at law has been commenced or not.<sup>(b)</sup>

In general, an injunction will not be granted to restrain a tenant from committing waste, where he holds the land "without impeachment of waste." But although the tenant for life, without impeachment of waste, is entitled by virtue of his tenure to do waste which produces an interest to him, yet, in equity, when this extensive power is abused, by making an unconscionable use of it, the courts will restrain it. Tenant for life without impeachment of waste, and tenant in tail after possibility of issue extinct, may be restrained from committing wilful, destructive, malicious, extravagant, or humorous waste.<sup>(c)</sup>

§ 2.—Of the writ of estrepement.

2412. This writ lay at common law to prevent a party in possession from committing waste on an estate, the title to which is disputed, after a judgment obtained in a real action, and before possession was delivered by the sheriff.

But as waste might be committed in some cases, pending the suit, the statute of Gloucester gave another writ of estrepement *pendente placito*, commanding the sheriff firmly to inhibit the tenant, "*ne faciat vastum vel estrepementum pendente placito dicto indiscusso.*"

(a) *Caldwell v. Baylis*, 2 Meriv. 408; 2 Story on Eq. Jur. § 917; 1 Fonb. Eq. B. 1, c. 1, § 5, note (p); Eden on Inj. 199.

(b) *Kane v. Vanderburgh*, 1 John. Ch. R. 11.

(c) *Vane v. Lord Barnard*, Prec. in Ch. 454; S. O. Gilb. Eq. R. 127; 1 Salk. 161; 2 Vern. 738; *Williams v. Day*, 2 Ch. Cas. 32; *Cooke v. Whaley*, 1 Eq. Ab. 400; Anon. 1 Freem. 273.

By virtue of either of these writs, the sheriff was authorized to resist those who committed waste or offered to do so; and to use sufficient force for the purpose.(a)

In Pennsylvania a similar writ may be issued by virtue of an act of assembly.

The more efficacious remedy to prevent waste by injunction, has rendered this writ nearly obsolete.(b)

§ 3.—Of the remedy for waste by action.

2413. The ancient writ of waste, which might have been issued at common law, and by virtue of several statutes, has been superseded in modern practice. It is usual to bring an action on the case in the nature of waste, instead of the action of waste, as well for that which is permissive, as for that which is voluntary.

In an action on the case in the nature of waste, the plaintiff recovers only for the waste; still, this action has advantages over the ancient remedy, that it may be brought by the reversioner or remainder man for life or years, as well as in fee or fee tail; and the plaintiff is entitled to costs in this action, which he cannot have in an action of waste.(c)

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(a) 3 Bl. Com. 225, 226. See 10 Vin. Ab. 497; Woodf. L. & T. 447; Archb. Civ. Pl. 17.

(b) B. 5, part 1, t. 3, c. 1, sec. 2, § 1, art. 3, n. 3.

(c) See Dane's Ab. c. 78, a, 15.



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